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CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Colorado

AT THE

JANUARY, APRIL AND SEPTEMBER TERMS
A. D. 1914

E. T. WELLS
Reporter

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JUSTICES OF THE SUPREME COURT.

DURING THE TIME OF THESE REPORTS.

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MORTON S. BAILEY,
WILLIAM A. HILL,
S. HARRISON WHITE,
JAMES E. GARRIGUES,
TULLY SCOTT,
} JUSTICES.

FRED FARRAR, ATTORNEY GENERAL.

JAMES R. KILLIAN, CLERK.

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AT THE PUBLICATION OF THESE REPORTS

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George W. Allen	" "	"
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A. Watson McHendrie	Third District	Trinidad
Granby Hillyer	" "	La Junta
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John E. Little	" "	" "
W. S. Morris	" "	" "
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RULES OF THE SUPREME COURT.

IN EFFECT SEPTEMBER 14, A. D. 1914.

SESSIONS EN BANC AND IN DEPARTMENTS

The Chief Justice may convene the court *en banc* at any time, and shall do so on the written request of three Associate Justices. Subject to this provision, or as limited by the Constitution, sessions of the court in departments for the purpose of hearing oral arguments, and designation of the Justices to hear such arguments shall be under the direction and control of the Chief Justice. In case of his absence or inability to act, such duties shall devolve upon the judge who would next be entitled to become Chief Justice.

WRITS OF ERROR—SUPERSEDEAS—PROCESS ON WRITS OF ERROR

Rule 1. Writs of error shall be directed to the clerk or keeper of the records of the court in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this court. In any case where a transcript of the record, duly certified to be full and complete, has been filed or may be hereafter filed, in the office of the clerk of this court, before the issuance of a writ of error, it shall not be necessary, except in a case where a *supersedeas* may be allowed, to deliver such writ to the clerk of the inferior court; but the same may be filed in the office of the clerk of this court, and such transcript so filed with the clerk of this court shall be taken and considered to be a due return to said writ of error. In capital cases, in which a writ of error shall issue and be made to operate as a *supersedeas* to stay the execution of the judgment of the trial court, as provided by statute, such writ of error, as also the *scire facias* to hear the errors assigned, shall be made returnable forthwith. When a writ of error shall issue in a case where a *supersedeas* has been allowed after the filing of the transcript of the record, and shall be served on the clerk of the inferior court, he shall return upon said writ that the same has been served upon him and that it appears by the endorsement thereon that a transcript of the record has been filed in the office of the clerk of the Supreme Court.

Rule 2. A *scire facias*, or summons to hear errors in civil cases, and criminal cases not capital, if issued ten days or more before the first day of the term, shall be returnable to the first day of the term. If issued less than ten days before the first day of the term, it may be made returnable to any day in the term; *Provided*, That in all cases, if such writ shall not be served ten days before the return day thereof, the defendant so served shall not be required to appear in obedience thereto until the first day of the term succeeding such return day.

A defendant upon whom process has not been served may enter his appearance, and, upon five days' notice to the plaintiff, may proceed in the same manner as if duly served with process.

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Rule 3. If a *scire facias*, or summons to hear errors, shall not be served, an *alias* or *pluries* may be issued without an order of court therefor.

Rule 4. No *supersedeas* will be granted unless the record upon which the application is made be complete and duly certified by the clerk of the court below, with assignments of error appended thereto, which assignments must be supported by a succinct printed or typewritten brief. No application for a *supersedeas* will be considered by the court, or by any Justice in vacation, unless the cause shall have been first docketed.

Upon the docketing of the cause, as aforesaid, the sum of ten dollars shall be paid to the clerk, and upon the allowance of the writ, or upon further prosecution of the cause, an additional sum of ten dollars shall be advanced to the clerk.

Rule 5. When a writ of error shall be made a *supersedeas*, the clerk shall endorse upon said writ the following words: "A transcript of the record in this cause having been filed in my office, with an order endorsed thereon that the writ of error herein be made a *supersedeas* according to law, this writ of error is therefore made a *supersedeas*, and shall operate accordingly;" which endorsement shall be signed by the clerk of this court.

Rule 6. Whenever execution or other final process shall be issued upon a judgment at law or decree in equity, and the record of such judgment or decree shall be removed into this court by writ of error operating as a *supersedeas*, such writ of error may be served upon the officer in whose hands such execution may be, and thereupon all proceedings under such execution shall be discontinued, and such officer shall return the same into the court from which it was issued, together with the copy of the writ of error served on him, and shall set forth in his return to such execution what, if anything, he hath done in obedience to the command thereof.

Such service of the writ of error and *supersedeas* may be made by delivering to the officer having such final process for execution a copy of such writ of error and the endorsements thereon, with the certificate of the clerk of the Supreme Court, or of the clerk of the inferior court to whom the same is directed, that the same is a true and perfect copy of the original of such writ of error and the endorsements thereon.

Rule 7. Whenever a bond is executed by an attorney in fact, the original power of attorney shall be filed with the bond in the office of the clerk of this court, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question; in which case the original power of attorney shall be presented to the clerk, and a true copy thereof filed, certified by the clerk to be a true copy of the original.

Rule 8. Clerks of inferior courts in making up an authenticated copy of the record in civil cases shall certify to this court so much of

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the record, arranged in chronological order, as the appellant or plaintiff in error may, by *præcipe*, indicate.

If the record, so certified, shall be insufficient, it shall be perfected at his cost; and, if unnecessarily voluminous, the cost of the unnecessory parts shall be taxed against him.

Rule 9. When a party to any cause pending in this court asks leave, without suggesting a diminution of record, to file an additional or supplemental transcript of the record, he shall give at least twenty-four hours' notice thereof to the opposite party. At the time of giving such notice the additional or supplemental transcript shall be deposited with the clerk of this court for the inspection of the opposite party. Such motion shall be submitted under Rule 23, and, if leave is granted, the additional or supplemental transcript may be filed and considered in connection with the original transcript.

DISMISSAL OF APPEALS

Rule 10. If a transcript of the record shall not be filed as required by law in case of appeal, the appellee may present a transcript of the judgment, the order allowing the appeal, the bond and the approval thereof, and thereupon the appeal shall be dismissed with costs.

Whenever an appeal or writ of error shall be dismissed, this court may, in its discretion, affirm the judgment of the court below.

ASSIGNMENT OF ERRORS

Rule 11. Appellants and plaintiffs in error shall assign errors in writing at the time of the filing of the transcript of the record, and each error shall be separately alleged and particularly specified; *Provided*, That when errors are assigned upon exceptions to the ruling of the court in the admission or rejection of evidence, which go to the same point, it shall be sufficient to refer to the folio numbers of the transcript, where such rulings and exceptions appear, without particularly specifying the evidence admitted or rejected.

When the error alleged is to the charge of the court, the part of the charge referred to shall be quoted *totidem verbis* in the specifications; *Provided*, Where the charge is divided into separate paragraphs or instructions, which are each duly numbered, and error is assigned as to one or more entire paragraphs or instructions, it shall be sufficient to designate the part of the charge referred to by giving the number prefixed to each paragraph or instruction so assigned for error.

The same shall be signed by an attorney of the court.

If the appellee or defendant in error desires to assign cross-errors, he shall do so at the time he files his brief, as hereinafter provided; which assignment of error shall be in writing and signed by an attorney of this court.

Rule 12. If the appellant or plaintiff in error shall fail to assign error, the appeal, or writ of error, may be dismissed.

No formal joinder in error shall be required, but if the appellee or defendant in error shall not in any manner appear within the time

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allowed for filing briefs in his behalf, the cause may be heard *ex parte*, or the judgment or decree of the court below may, in the discretion of the court, be reversed without a hearing.

Rule 13. Counsel will be confined to a discussion of the errors stated, but the court may, in its discretion, notice any other error appearing of record.

ABSTRACT OF RECORD

Rule 14. Appellants and plaintiffs in error in all cases shall, within ninety days after the return day, prepare and file with the clerk fifteen copies of a printed abstract of the record, in which they shall set forth the title of the cause, with the date of the filing of all papers in the court below, and a brief statement of the contents of each pleading, and shall set forth fully the points relied upon for the reversal of the judgment or decree. They shall also refer to the folio numbers in the transcript and bill of exceptions, on the margin of the abstract, in such manner that orders, pleadings, and evidence therein referred to may be easily found in the record. (Abstract must be indexed. Rule 20-G, adopted June 19, 1914.)

If the abstract filed shall not present the parts of the record to which reference is made in the assignment of errors, the appeal or writ of error may be dismissed. (Modified June 19, 1914; Rule 22.)

Rule 15. Counsel for appellee or defendant in error may, if he is not satisfied with the abstract of record filed in the case, within the time allowed him for his brief, file with the clerk fifteen copies of such further abstract as he shall deem necessary to a full understanding of the merits of the cause.

Rule 16. In case the appellant or plaintiff in error shall neglect to file an abstract and brief as required, the opposite party may file the same and prepare the cause for hearing *ex parte*, and have the costs taxed therefor, or the court may dismiss the appeal or writ of error without notice.

Rule 17. All transcripts of record shall be bound in half sheep or cloth, with substantial paper sides, thirteen inches in length, and eight and one-quarter inches in width.

All briefs of counsel and abstracts of the record shall be printed on pages 9⅛ inches in length and 7½ inches in width, when trimmed, in small-pica type, leaded, face of type page 22x40 ems pica, so printed as to leave an inside side margin of 1½ inches, and an outside side margin of 2⅜ inches, and a bottom margin of 2 inches. Extracts and quotations must be in the same type, either solid or indented, in the discretion of counsel. The number of the case in this court must be printed in large figures at the top of the title page. (Modified June 19, 1914; see Rule 23.)

The brief of counsel for appellant or plaintiff in error shall contain a statement of the errors relied upon, and the authorities to be used in the argument, and fifteen copies thereof shall be filed with the

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clerk within forty days after the day fixed by rule for the filing of his abstracts.

If the brief of appellant or plaintiff in error shall be filed in compliance with this rule, the appellee or defendant in error shall file with the clerk fifteen copies of his brief within sixty days after the expiration of the time mentioned for the filing of the brief of appellant or plaintiff in error.

Thirty days thereafter shall be allowed for the reply of appellant or plaintiff in error, fifteen copies of which shall be filed, as provided in case of other briefs.

Two copies of all abstracts and briefs shall be served by counsel upon the opposing counsel, if appearance shall have been entered, proof of which shall be filed with the clerk.

The clerk shall not file transcripts, abstracts of the record, or briefs which do not strictly conform, as to form, with this rule.

Rule 18. For good cause shown, the court, or a Justice thereof in vacation, may extend or abridge the time for filing abstracts, briefs, and other papers.

Rule 19. The application of the foregoing rules concerning the filing of abstracts, briefs, and other papers shall not be suspended by any stipulation or motion filed in a cause, except by order of the court or one of the Justices thereof.

Rule 20. In citing cases from published reports, there shall be given the names of the parties, as they appear in the title of the cases, and the book and initial page, and also the page containing the particular point involved. The name of but one of each of the parties shall be printed, and in case of corporations the leading name of the company must be used. If cases are published in more than one series of reports, the citation to the official reports must in every case be given.

Rule 21. Counsel who have not complied with the rules relating to briefs will not be heard.

Rule 22. Oral argument upon the final hearing of any cause may be had upon written motion therefor, filed with the clerk or by order of the court, *sua sponte*. Such motion must be filed within thirty days after the cause is at issue. Due notice of the time set for the argument will be given by the clerk.

MOTIONS

Rule 23. All motions shall be in writing. After appearance, the opposite party shall be entitled to notice of motions, not of course.

The party filing any such motion shall have three days in which to file briefs in support thereof; the party opposing shall have five days after service of copy upon him, to answer, and three days shall then be allowed after like service for reply. The motions shall then stand submitted.

All such briefs may be typewritten. Copies of the same shall be served upon the opposite party or his attorney.

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WITHDRAWAL OF PAPERS

Rule 24. No paper shall be taken from the files without leave of court, except the transcript of the record, which may be withdrawn by counsel, for eight days and no more, for the purpose of making abstracts.

Every paper taken from the files, by leave of court or otherwise, must be retained in the custody of the party withdrawing it, and it must not be in any manner mutilated, taken apart, cut, or marked.

Rule 25. Application for rehearing of any cause shall be by petition to the court, signed by counsel, briefly stating the points wherein it is alleged that the court has erred; such petition to be filed within ten days next after the filing of the opinion in the cause. Counsel shall accompany such petition with a brief of the authorities relied upon in support thereof.

A copy of such petition and brief shall be served upon the opposing counsel forthwith, who, if he desires, shall have ten days after service within which to file an answer thereto and petitioner five days for reply. Such petitions and briefs shall be printed and comply with Rule 17 as to form.

Rule 26. The filing of a petition for a rehearing shall suspend proceedings under the decision until the petition is disposed of, unless the court in term time, or one of the Justices in vacation, shall otherwise order,

Rule 27. Upon the determination of a petition for rehearing, or if within ten days after final judgment, no such petition shall have been filed, the clerk shall issue *remittitur* to the court below, or, if in an original proceeding, issue a certified copy of the final judgment.

COSTS

Rule 28. Upon printed abstracts being furnished, as required in the foregoing rules, it shall be the duty of the clerk, unless otherwise ordered, to tax a printer's fee at the rate of one dollar per page of one copy of such abstract against the unsuccessful party not furnishing such abstract, as costs, to be recovered by the successful party furnishing the same.

Rule 29. Clerks of District Courts and other courts of record shall be entitled to receive the fees allowed by law for all copies of records before delivering the same, except in criminal causes where the defendants are unable to pay for transcripts of the record and the trial judge shall have ordered the same to be furnished without charge.

Rule 30. Except as provided in Rules 4 and 48, upon the filing of any suit or proceeding, there shall be paid to the clerk by the party filing the same the sum of twenty dollars ($20.00), which shall be for and in full payment of all clerical costs of such party in the cause, except for copies of papers. And upon the entry of appearance, the opposite party shall pay to the clerk the sum of five dollars ($5.00), which shall be for and in full payment of the like costs of said party

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in the cause. Upon the determination of the cause by this court, the successful party shall have judgment and execution against the unsuccessful party for the amount of said payment, together with any other costs or damages awarded by the court pursuant to law or the rules of court.

SPECIAL TERMS OF COURT

Rule 31. Special terms of court may be held at any time upon an order signed by at least four of the Justices of the court and filed in the office of the clerk at least fifteen days prior to the day appointed for the assembling of the court. The clerk, on receipt of such order, shall forthwith enter the same at length in the records of the court, and give notice of the appointment of such special term, and the day appointed therefor, in one or more newspapers published at the seat of government.

No appeal, or *scire facias* to hear errors, shall be returnable to any special term.

CONTESTED ELECTIONS

Rule 32. Any qualified elector wishing to contest the election of any person to the office of presidential elector, supreme, district, or county judge, shall, within thirty days after the canvass of the State Board of Canvassers, in case of a presidential elector, supreme, or district judge, file in the office of the Secretary of State a written statement of his intention to contest; and where the contest is for the office of county judge, such statement shall be filed in the office of the county clerk of the county in which the person whose election to the office of county judge is contested, resides; within thirty days after the canvass by the county board of canvassers, which statement shall set forth:

First—The name of the contestor.

Second—The name of the contestee.

Third—The office.

Fourth—The time of the election.

Fifth—The particular cause of contest.

The statement shall be verified by the affidavit of the contesting party that the causes set forth are true, as he verily believes.

Rule 33. It shall be the duty of the Secretary of State and the county clerk to safely keep and preserve all such statements in their respective offices.

Rule 34. If the contest is to be further prosecuted, the contestor, or some one in his behalf, or in behalf of the person for whose benefit the contest is made, shall, within thirty days after the filing of such statement of contest, file in the offices of the clerk of the Supreme Court, if the contest relate to a presidential elector or supreme judge, or in the office of the clerk of the District Court in the proper county of the judicial district, if the contest relate to a district or county judge, a petition setting forth the filing of the statement of contest and the particular grounds therefor; which petition shall be verified

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by the oath of some credible person. Upon the filing of such petition, if the contest relate to a presidential elector or supreme judge, the clerk of the Supreme Court shall issue a summons, or if the contest relate to the office of district or county judge, then the clerk of the proper District Court shall issue a summons, directed to the sheriff of the county where the respondent resides, under the seal of the court; which summons, if issued out of the Supreme Court, shall bear *teste* in the name of the Chief Justice, and if issued out of the District Court, then in the name of the district judge, or of the presiding judge of said court, and be returnable in not less than ten nor more than thirty days; the same may be served by the sheriff of the county in the same manner that like writs are served from the District Court, and shall command the respondent to be and appear before the court from which the writ issues by a day to be named therein, and answer the petition of the petitioner in that behalf; such summons may be issued to any county in this state where the respondent may be found. *Alias* and *pluries* writs may issue in case service is not had under the original.

Rule 35. Upon the return day of the writ, if it shall appear that due service has been had, and the respondent fails to plead, default may be entered, and in that case, if the proceeding is pending in the Supreme Court, the court, or any four or more judges thereof in vacation, or if the proceeding is pending in the District Court, then the District Court, or any judge thereof in vacation, may grant the relief demanded, either with or without proof, as in the judgment of said court or the judges, or judge, thereof it may seem proper. The respondent's answer shall be under oath, and shall contain a general or specific denial of each material allegation in the petition intended to be controverted, and may contain a statement of new matter, showing in ordinary and concise language the right or title of the respondent to the office in question. The sufficiency of the petition or answer may be questioned by demurrer or motion. If a pleading be found defective, it may be amended on such terms as the court, or the judges or judge thereof, may deem proper.

Every material allegation of the petition not controverted by the answer will be taken as true; the statement of any new matter in the answer will, at the hearing, be deemed controverted by the petitioner. The petition, answer, and demurrer or motion shall constitute the pleadings in the case.

Rule 36. When the case is at issue, the court, or, as the case may be, the judges, or judge, thereof in vacation, shall hear and determine the same in a summary manner, without the intervention of a jury. Unless otherwise ordered, no witness will be examined in open court, or before, or in the presence of, the judges, or judge, thereof in vacation.

Either party, after the issues are formed, may have the deposition of any witness taken before any officer authorized by law to administer oaths, which deposition shall be taken and returned in the manner

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prescribed by the civil code for the taking and returning of depositions in ordinary civil actions.

Rule 37. The finding and judgment of the court, or the judges, or judge, thereof in vacation, as the case may be, shall be entered at length upon the record of the court. The court, or, as the case may be, the judges, or judge, thereof in vacation, shall award costs to the successful party, and execution shall issue therefor, the same as in other cases. Witnesses and officers shall receive like compensation as prescribed by law for like duties and services in cases in the District Court.

APPLICATIONS FOR ORIGINAL WRITS

Rule 38. In any application made to the court for a writ of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunction, or for any prerogative writ to be issued in the exercise of its original jurisdiction, and for which an application might have been lawfully made to some other court in the first instance, the petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it necessary or proper that the writ should issue originally from this court, and not from such other court.

In case any court, justice, or other officer, or any board or other tribunal, in the discharge of duties of a public character, be named in the application as respondent, the petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceeding, and in such case it shall be the duty of the applicant obtaining an order for any such writ, to serve, or cause to be served, upon such party or parties in interest a true copy of the petition and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application and proceedings, and to produce and file in the office of the clerk of this court the like evidence of such service.

RULES GOVERNING ADMISSION OF ATTORNEYS TO THE BAR

Rule 39. No person shall be admitted to practice as an attorney or counselor-at-law upon evidence that he hath been admitted to the bar of another state or territory, if at the time of his admission to the bar of such state or territory he was a citizen of this state; nor shall any person be permitted to practice law in this state who shall not first have taken and subscribed an oath that he is a citizen of the United States, or has duly declared his intention of becoming such; that he will commence the practice of law in this state within three months from the date thereof, and make the same his permanent and usual occupation; that he has never been disbarred by any court of record in which he has heretofore practiced, and that he has never been convicted of felony; and, if disbarment proceedings have ever been instituted against him, he shall in his oath state the fact and the court wherein such proceedings were instituted.

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Rule 40. A Committee of Law Examiners is hereby constituted, consisting of five members of the bar of at least five years' standing, who shall be appointed from time to time by the Supreme Court, and shall hold office as a member of such committee for a term of five years, and until the appointment of his successor.

Rule 41. Any person who has been admitted to practice as an attorney and counselor in the highest court of law of another state or country having power to admit to practice, and has practiced five years in its courts of record, may, in the discretion of the Supreme Court, be admitted and licensed without an examination; *Provided*, That the requirements for admission in said state or country are equal to those in this state.

Said proviso shall not, however, apply to a person who has been admitted to practice as an attorney and counselor in the highest court of law of said state or country having power to admit to practice, and has practiced ten years in its courts of record.

Such person shall prove, by his own affidavit or otherwise, if required, to the satisfaction of the Committee of Law Examiners: That he is a citizen of the United States, or has declared his intention of becoming such; that he is twenty-one years of age, stating his age; that he is a citizen of the state, stating his address, and stating with particularity the community or communities in which he resided and practiced covering a period of five years next preceding the date of his application.

Such person shall also produce a certificate of recommendation from one of the judges of the highest court of law of such other state or country, or furnish other satisfactory evidence of character and qualifications.

Such affidavit and recommendation or evidence shall be presented to the Committee of Law Examiners, who shall pass thereon, and, if satisfactory, shall give to the applicant for admission a certificate of recommendation for admission to the bar of this court, and said committee shall be entitled to hold said application for the period of sixty days for the purpose of making an investigation as to the character and qualifications of the applicant.

Rule 42. All other persons may be admitted and licensed upon producing and filing with the court the certificate of the Committee of Law Examiners that the applicant has satisfactorily passed the examination prescribed by these rules, and has complied with their provisions, and is a person of good moral character.

Rule 43. To entitle an applicant to an examination as an attorney and counselor, he must prove, by his own affidavit, and otherwise if required, to the satisfaction of the Committee of Law Examiners:

(a) That he is a citizen of the United States, or has duly declared his intention of becoming such; twenty-one years of age, stating his age; and a resident of the state, stating his address; and that he has not been examined for admission to practice, and been refused admission and license, within six months immediately preceding, and has

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during said time diligently prosecuted the study of law, and that at the beginning of his study of the law he had the scholastic qualifications herein required.

(b) That he has studied law in the manner and according to the conditions hereinafter prescribed for a period of three years, and that he is the same person mentioned in his preliminary papers; except that persons who have been admitted as attorneys in the highest court of another state or country having jurisdiction to license attorneys, and have remained therein as practicing attorneys for at least two years, may be admitted to such examination after a period of law study of one year within this state.

Rule 44. Applicants for examination shall be deemed to have studied law, within the meaning of these rules, only when they have complied with the following terms and conditions, viz.:

(a) The provisions for requisite periods of study must be fulfilled by serving in this state a regular clerkship in the office of a practicing attorney of the Supreme Court of this state, after the age of eighteen years, or after such age, by attending an incorporated law school, or a law school connected with an incorporated college or university, whose standing shall be approved by the committee, organized with competent instructors and professors, in which instruction is regularly given, or after such age, by pursuing such course of study, in part by attendance at such law school, and in part by serving such clerkship.

(b) The one year of law study prescribed by subdivision b, Rule 43, for applicants who have been admitted to the bar of another state or country shall be pursued after said practice for the period of one year in said state or country has been completed.

(c) Applicants who are not members of the bar, as above prescribed, shall present a thirty-count certificate from the regents of the University of the State of New York, or shall satisfy said committee that they graduated from a high school or preparatory school whose standing shall be approved by the committee, or were admitted as regular students to some college or university, approved as aforesaid, or, before entering upon said clerkship or attendance at a law school, they passed an examination before the State Superintendent of Public Instruction in the following subjects: English literature, civil government, algebra to quadratic equations, plane geometry, general history, history of England, history of the United States; and the written answers to the questions in the above named subjects shall be examined as to spelling, grammar, composition, and rhetoric. The said examination shall be conducted in connection with the regular county examinations of teachers.

Attendance at a law school during a school year of not less than eight months in the year shall be deemed a year's attendance under this rule; and, in computing the period of clerkship, a vacation actually taken, not exceeding three months in each year, shall be allowed as part of such year.

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It shall be the duty of attorneys with whom a clerkship shall be commenced to file a certificate of the same in the office of the clerk of the Supreme Court, which certificate shall in each case state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing, and shall be computed by the calendar year.

Rule 45. The Committee of Law Examiners, before admitting an applicant to an examination, shall require proof that the preliminary conditions prescribed by these rules have been fulfilled; which proof shall be as follows, viz.:

(a) That he has been admitted to the bar of another state or country, by the production of his license or certificate executed by the proper authorities, and that he remained therein as a practicing attorney for at least two years, by the applicant's affidavit stating where he resided during said time.

(b) That he has served a regular clerkship in the office of a practicing attorney of the Supreme Court in this state, after the age of eighteen years, by producing and filing with the committee a certified copy of the attorney's certificate, as filed in the office of the clerk of the Supreme Court, and producing and filing an affidavit of the attorney or attorneys with whom such clerkship was served, showing the actual service of such a clerkship, the continuance and end thereof, and that not more than three months' vacation was taken in any one year.

(c) The time of study allowed in a law school must be proved by the certificate of the dean or secretary of the faculty under whose instruction the person has studied, under the seal of the school, if such there be, in addition to the affidavit of the applicant, which must also state the age at which the applicant began his attendance at such law school; which proof must be satisfactory to the committee of examiners.

(d) The fact of graduation from a university, college, high school, or preparatory school, or of admission to a college or university, may be proved by a diploma or certificate signed by some officer or instructor of the school, college, or university.

(e) The fact of having passed the examination before the Superintendent of Public Instruction may be proved by the certificate of that officer.

(f) That the applicant is of good moral character, by the certificate of the attorney with whom he has passed his clerkship, or of some attorney in the town or city where he resides; but such certificate shall not be conclusive, and the committee may make further examination and inquiry.

(g) When it satisfactorily appears that any diploma, affidavit, or certificate required to be produced has been lost or destroyed, without the fault of the applicant, or has been unjustly refused or withheld, or, by the death or absence of the person or officer who should

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have made it, cannot be obtained, the Committee of Law Examiners may accept such other proof of the requisite facts as they may deem sufficient.

Rule 46. As soon as possible after each examination, the committee shall furnish to the clerk of the Supreme Court the names and addresses of all persons taking the examination. The clerk shall immediately post said names and addresses in a conspicuous place in his office, and keep them so posted for a period of thirty days. The clerk shall also furnish said names and addresses to such newspapers as desire to publish them. Any person may during said period send to the committee any information indicating that the applicant is not of good moral character, and if they are satisfied that the claim is true, they shall refuse to certify the name of the applicant to the Supreme Court. Such information shall be deemed to be confidential. Otherwise, and if he shall pass the examination herein provided for, his name shall be so certified, and thereupon license will be issued.

Rule 47. The Committee of Law Examiners shall hold two examinations in each year. Such examinations shall be held in the months of June and December at the Supreme Court in the Capitol building at Denver, Colorado. It shall also be the duty of the committee to pass upon the qualifications of applicants presenting themselves under the provisions of Rule 41, either at special meetings called by the chairman of the committee, when such applications may be presented, or by individual recommendation evidenced by a certificate signed by the members of the committee or the majority thereof.

BINDING ABSTRACTS AND BRIEFS

Rule 48. The clerk shall file with the librarian of the Supreme Court library a complete set of the printed abstracts of record and briefs filed in all cases, which shall be suitably bound in volumes uniform in size, as near as practicable, with the reports of this court, which shall become a part of the library of this court.

The clerk shall also cause one set of the printed briefs and abstracts to be bound for the files of this court. To defray the expense of such binding, he shall collect from each side the sum of fifty cents at the time the other fees are collected.

LIBRARY

Rule 49. No book shall be withdrawn from the library of this court, for any purpose, except by order of court in open session.

WRITS OF ERROR TO COURT OF APPEALS

Rule 50. A writ of error to review a judgment of the Court of Appeals shall be brought within sixty days after its rendition, and not thereafter; *Provided*, That a writ of error shall not be prosecuted in any case unless the aggrieved party shall first petition the Court of Appeals for a rehearing within the time limited by the rules of that court. The time within which the writ of error from this court shall be sued out shall begin to run from the date such petition for rehear-

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ing is denied, and the errors assigned shall be limited to those raised by such petition.

Rule 51. In cases so brought to this court, a transcript of the record and copy of the opinion of the Court of Appeals shall be lodged, together with the original transcript, and abstracts, and a new assignment of errors. Briefs shall be filed, and, in general, the procedure shall be as provided by the rules of this court and the Code in other cases. No additional abstracts shall be required unless by special order in particular cases.

Rule 52. The docket fees shall be the same as now provided by the rules of this court, and the fees of the clerk of the Court of Appeals shall be limited to the services rendered in making a transcript of the record of the Court of Appeals and the copy of the opinion in the case brought here for review, which fees shall be collected and paid into the state treasury. (Adopted by the Supreme Court January 8, 1912.)

RULES OF PRACTICE AND PROCEDURE IN CIVIL CAUSES.

Adopted by the Supreme Court on the 19th day of June, 1914, by virtue of authority under an act of the General Assembly, Session Laws 1913, 447, which provides: "The Supreme Court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same. Such rules shall supersede any statute in conflict therewith." (Effective September 14, 1914.)

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1. ALLEGATIONS COMMON TO EACH CAUSE OF ACTION, COUNT OR DEFENSE NEED NOT BE REPEATED—COPIES OF INSTRUMENTS MAY BE ATTACHED AS EXHIBITS.

In a complaint, cross-complaint, or answer, embracing several causes of action, counts or defenses, matters or allegations common to each cause of action, count or answer, need not be repeated, but in an appropriate manner may be briefly referred to and made a part of the cause of action, count or defense following. Copies of written instruments may be made a part of a pleading by being attached thereto and referred to in the pleading as exhibits.

2. SUMMONS—BY WHOM ISSUED—DISMISSAL OF ACTION.

Summons shall be issued by the clerk only, and under the seal of the court, but not until after the complaint is filed. Plaintiff may have a summons issued at any time within thirty days after filing his complaint. If not issued and delivered within that period, the clerk shall enter an order dismissing the action.

3. SERVICE OF NOTICE OF MOTION BY MAIL.

Service of notice may be by mail as prescribed in Chapter 37, Revised Code, 1908, and when so served the time shall be increased above that to be given where service is personal, one day for every

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one hundred and twenty-five miles, or fraction thereof, between the place of deposit and the place of address.

4. MOTION TO QUASH PROCESS OR SERVICE—GENERAL APPEARANCE—EXEMPTIONS.

A motion to quash a summons or *scire facias* or service of either shall not be entertained, but shall be deemed a general appearance by the party making such motion. This rule shall not apply where the moving party claims exemption from service of process, nor to service of process on minors or persons judicially declared incapable of conducting their own affairs.

5. DEMURRER FOR INSUFFICIENCY OR WANT OF JURISDICTION MUST SPECIFY GROUNDS—PENALTY FOR FAILURE.

A general demurrer to a pleading, or one challenging the jurisdiction of the court shall specify in detail the grounds upon which it is based. If it fails to do so it shall be disregarded. If at the trial a pleading is attacked upon the ground of its insufficiency, or for the reason that the court is without jurisdiction, where a demurrer upon either of these grounds was not filed, or if filed, did not specify or point out the question raised for the first time at the trial, the party whose pleading is thus assailed may amend as of course, and the trial proceed, or if necessary in order to procure evidence the cause may be continued at the cost of the party failing to comply with this rule.

6. STATEMENT FILED WITH ANSWER IN ACTIONS ON CONTRACTS FOR PAYMENT OF MONEY—JUDGMENT FOR PLAINTIFF IF STATEMENT DOES NOT DISCLOSE DEFENSE.

In actions upon written contracts for the payment of money, the defendant, when he files his answer, shall in addition file a verified statement setting up the nature and substance of his defense. If it appears from such statement that his defense is without merit or is sham, the court, upon motion of plaintiff and notice to defendant, shall give judgment for plaintiff for such sums as he shall establish by requisite proof.

7. STATEMENT DEFINING ISSUES OF FACT—CERTIFICATE THEREOF FILED.

When it appears that the issues of fact are not clearly defined by the pleadings, the parties before trial, on motion of either, or by order of the court or judge, may be directed to prepare and sign a statement defining such issues. If they do not agree, such issues shall be settled by the court or judge. The trial of facts shall be limited to those thus fixed. The statement of such issues shall be filed with the clerk, and with the exceptions thereto, if any, duly noted thereon, signed by the judge, shall become a part of the record in the cause. Such statement may be amended.

8. DOCKETING CAUSE WHEN PLACE OF TRIAL IS CHANGED—FAILURE TO DO SO—ORDER VACATED.

In case of change of place of trial of an action the party at whose

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instance such change is granted shall docket the cause in the court to which it was transferred within fifteen days after the transfer was ordered. On failure to do so, the court ordering the change, on motion of the adverse party and notice to opposite counsel, with proof of such failure, shall set aside the order of transfer and shall thereupon be reinvested with full jurisdiction of the cause for all purposes, except where the change was ordered on account of the disqualification of the judge, in which instance a competent judge shall be secured to try the cause, unless the parties agree upon an attorney to preside at the trial. The party at whose instance the place of trial was changed shall not be permitted to apply for another change upon the same ground.

9. WHEN DISMISSAL OR NON-SUIT BARS ANOTHER ACTION.

The dismissal of an action upon the ground that the testimony does not establish the cause of action involved or a judgment of non-suit for the same reason, is a final determination of the merits of such action, and bars a new action between the same parties or their privies on the same cause of action, unless the court shall dismiss or direct judgment of non-suit without prejudice.

10. RETRIAL MAY BE LIMITED TO SPECIFIC QUESTIONS OF FACT.

Upon a motion for a new trial, the court may, when practical, order a retrial of such questions of fact with respect to which error was committed or which were not established, leaving those properly established to stand.

11. EACH DISTRICT COURT TO ESTABLISH TIME IN EACH COUNTY FOR HEARING OF PRELIMINARY MATTERS.

Each district court shall establish one or more times between terms in each county of the district, as the transactions of business may require, for the hearing and disposition of demurrers, motions, and other preliminary and interlocutory matters. The times thus fixed shall be so arranged as not to materially interfere with other official duties of the judge or judges in any county in the district.

12. DISTRICT COURT TO PROVIDE RULE FOR DISMISSAL OF ACTIONS.

Each district court shall by rule provide for the dismissal of actions not prosecuted or brought to trial with due diligence.

13. INSTRUCTIONS—OBJECTIONS HOW MADE—REVIEW LIMITED TO SUCH OBJECTIONS.

Counsel shall present to the trial court, at or prior to the close of the evidence, such instructions as they may desire. The court shall afford respective counsel a reasonable time and opportunity to examine proposed instructions, whether requested, or to be given by the court of its own motion, and to prepare and present objections thereto before given to the jury. Such objections shall specify briefly the particulars

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wherein instructions are defective or not correct, be directed to each instruction separately, and on motion for new trial, or on review by the supreme court or court of appeals, only the grounds so specified shall be considered. They shall be in writing, signed by counsel making them, and, together with the exceptions to the ruling of the court noted thereon, attested by the trial judge, filed with the clerk, and thereupon shall become a part of the record in the case.

14. WRIT OF ERROR—LIMITATION ONE YEAR—SAVING CLAUSE.

A writ of error shall not be brought after the expiration of one year from the date of the rendition of the judgment complained of; provided, that as to judgments rendered prior to the date these rules take effect, a writ of error may be brought at any time within one year from that date, if that period is within three years from the rendition of such judgment. Where a person thinking himself aggrieved by any judgment or decree, reviewable on error, shall be an infant or *non compos mentis*, when the same was rendered, the time of such disability shall be excluded from the computation of said year. This rule shall not apply to divorce or other special proceedings otherwise limited.

15. ORDER APPOINTING OR DENYING RECEIVER MAY BE REVIEWED.

An order appointing or denying the appointment of a receiver may be reviewed on error before final judgment, if prompt application for that purpose is made.

16. STAY OF EXECUTION PENDING APPLICATION FOR SUPERSEDEAS.

The second paragraph of section 6 of Chapter 6, entitled, "Appeals and Writs of Error," Session Laws of 1911, page 9, is hereby amended to read as follows: Execution shall stay until the expiration of said five days, and upon motion within said five days the trial court shall grant a further stay of execution not exceeding thirty days from the time of entry of judgment pending application to the supreme court for a supersedeas. If within this period plaintiff in error dockets the cause in the supreme court on error, by filing a verified statement setting out the nature of the action, the issues and judgment, and date of entry thereof, together with such rulings and other matters complained of, from which it appears the trial court may have committed error to his prejudice, the supreme court shall have power upon terms to stay such execution pending such supersedeas application for an additional period not exceeding ninety days. Such writs of error shall be amendable upon order of the supreme court in any matter wherein they are at variance with the record in the case so as to make them agreeable to such record.

17. PROCEDURE ON APPLICATION FOR SUPERSEDEAS.

On application for a supersedeas, counsel for plaintiff in error shall, at the same time, or within such time as may be granted, file a brief in support thereof, and serve upon counsel for defendant in error

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a notice of such application and copy of his brief, who may within ten days thereafter file a written brief in opposition, a copy of which shall be served upon counsel for plaintiff in error, who may reply thereto within five days. The application shall then stand submitted.

18. IF SUPERSEDEAS DENIED COURT MAY DISMISS OR AFFIRM.

When an application for a supersedeas is denied the supreme court in its discretion may dismiss the proceeding or affirm the judgment.

19. MOTION FOR NEW TRIAL NECESSARY—REVIEW LIMITED TO QUESTIONS THUS RAISED.

Before a review of the judgment rendered in a contested cause can be had before the supreme court, the party claiming to be aggrieved by such judgment shall file with, and there shall be considered by the trial court, a motion for a new trial within the time and manner prescribed by the code of civil procedure. On review, only the questions thus presented to the trial court will be considered.

20. RECORD ON ERROR.

A party desiring to have any final judgment, or reviewable order of a court of record, or a judge thereof, reviewed by the supreme court, may make a record on error containing a statement of so much of the pleadings, proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of.

(a) Such record shall contain the assignment of errors relied on, together with so much of a transcript of the pleadings and record proper as shall be necessary or essential to a proper consideration by the supreme court of the errors assigned; and so much of the evidence, rulings, orders, instructions, objections and exceptions, occurring upon the trial of the cause, as may be necessary for such purpose. Where error is assigned on instructions, the record must contain all instructions given, and those requested by plaintiff in error and refused. Where error is assigned on the giving or refusal of an instruction, or upon the insufficiency of the evidence to sustain the judgment, the substance of all evidence necessary to properly consider such assignment must be set forth in the record.

(b) The evidence to be included in the record on error shall not be set forth in full, but shall be stated in simple and condensed form. That not essential to the decision of the questions presented by the assignments shall be omitted. The testimony of witnesses shall be stated in narrative form save that, if either party desires it, any part of the testimony may be reproduced in the exact words of the witness.

(c) The duty of preparing the record on error shall rest primarily upon the plaintiff in error, who shall, within sixty days from the date the motion for a new trial is denied, serve the original, or a copy thereof, upon the opposing parties or their attorneys, who may within thirty days thereafter suggest amendments thereto in writing and present the same to the party preparing the record, or his attor-

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ney. Such record and suggested amendments shall be submitted to the trial judge within ten days thereafter. At the expiration of the time named, or such further time as the court or judge may allow, such record, together with any objections or amendments proposed by any party, shall be considered by the judge, and if the statement be true, complete and properly prepared, it shall be approved by the judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the judge, and shall then be approved by him. When approved and certified it shall be filed in the clerk's office and become the record for the purpose of the proceedings on error.

(d) In preparing the record, care shall be taken to avoid the inclusion of more than one copy of the same paper, and to exclude the formal and immaterial parts of all exhibits, documents, entries and other papers or evidence; and for an infraction of this or any kindred rule, the supreme court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. If in the record on error anything material to either party be omitted by accident or error, the appellate court may direct the omission to be corrected by supplying such omission. The record on error, when settled and signed, shall be certified by the trial judge, which certificate shall show that the judge has fully and carefully examined and considered the record so made, in connection with the assignments of error, and cross-error, if any such be assigned, and that in his judgment the same contains all parts of the record, proceedings and evidence in the case, necessary or essential to a review of the errors or cross-errors assigned. The record on error shall then be filed with the clerk of the trial court, and certified by him, without being transcribed, to the supreme court, and shall constitute the sole record on review, subject only to amendment allowed by the appellate court.

(e) The court or judge may, upon good cause shown, extend the time for preparing the record on error, and the time within which such record may be served; and the time when the same may be presented for settlement, after it has been made, served and amendments suggested. In all cases heretofore and hereafter tried, when the term of the office of the trial judge shall have expired, or may hereafter expire, before the time fixed for making and settling, signing and certifying a record, it shall be the duty of the judge who tried the cause to sign and settle the same in all respects as if his term had not expired. If no amendments are suggested by the opposing party, within the time allowed, the judge shall settle, sign and certify the record in manner and form as above provided. When, by virtue of the provisions of the code, a bill of exceptions may be preserved by affidavits, a record on error may be similarly preserved.

(f) Whenever the appellate court directs that an omission in the record be supplied, it shall be by supplemental record, approved and certified by the trial judge and filed with the clerk of the trial court

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and shall become a part of the record on error and be certified and transmitted accordingly.

(g) The record on error shall be folioed and indexed. It shall also be abstracted in the manner now or hereafter provided by the supreme court in its rules on that subject. Such abstract shall also be properly indexed.

21. AGREED RECORD ON ERROR.

The parties to an action, after final judgment, may agree upon a record on error in the following manner: (a) File with the clerk of the trial court an assignment of errors. (b) Prepare and sign a statement of the case, showing how the questions assigned as error arose and were decided in the trial court, and setting forth so much of the facts alleged and proved or sought to be proved, and other matters essential to a decision of such questions by the supreme court. If such statement be approved by the trial judge by a certificate to the effect that it is true and correct, and embraces all matters presented at the trial which are necessary for the supreme court to consider in passing upon the errors assigned, it shall be filed with the clerk of the trial court. When so filed, and a certified copy of the judgment rendered in the cause attached, together with the assignment of errors, it shall be certified by the clerk to the supreme court as the record on error.

22. ABSTRACT OF RECORD—HOW PREPAID—SUPPLEMENTAL ABSTRACT.

Rule 14, adopted by the supreme court, April 5, 1905, is supplemented as follows: The abstract of record shall contain a brief statement of the contents of the pleadings, orders and judgment, except where from the nature of the questions raised it is necessary to state them in full. All other parts of the record shall be summarized and stated in condensed form, save where from the character of the questions raised by the assignment of errors, it is essential that testimony be reproduced in the exact words of the witness. Where error is assigned on instructions, those given, as well as those requested by plaintiff in error and refused, shall be stated in full. The abstract shall contain the assignment of errors and be indexed in such manner that orders, pleadings, evidence, and all matters therein contained may be readily referred to. The object of this rule is to have the abstract present only such a summary of the record as is necessary to consider and determine the questions raised by the assignment of errors, and for its violation in this respect costs may be imposed or withheld. If by accident or error, anything material to either party is omitted from the abstract, such omission may be supplied by a supplemental abstract.

23. ABSTRACTS AND BRIEFS—HOW PRINTED.

Abstracts and briefs shall be printed on blue white—wove antique—finish book paper of a weight the basis of which shall be eighty

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pounds to the ream, 25"x38" in size. The abstract of record shall contain, on the front cover, the title of the case, the court to which the writ of error lies, and the name of the trial judge.

24. WHEN COSTS TAXED TO PLAINTIFF IN ERROR ON REVERSAL.

When a judgment is reversed by the supreme court or court of appeals for insufficiency of a pleading or for want of jurisdiction of the trial court, and for either of these reasons only, upon any ground not called to the attention of the trial court, in conformity with Rule 5 hereof, the costs in the appellate court, as well as in the trial court, shall be taxed to the party securing a reversal in such circumstances.

25. RETRIAL OF SPECIFIED QUESTIONS OF FACT.

The supreme court and court of appeals on reversing a judgment may order a retrial of specified questions of fact, and direct that specific questions of fact stand as established when it appears that neither party to the action will be prejudiced by such order.

26. COPIES OF OPINION FURNISHED COUNSEL.

In all cases where a written opinion is handed down the clerk shall mail a copy to one attorney upon each side of the case.

WHAT THESE RULES SUPERSEDE—WHEN TAKE EFFECT.

These rules supersede all statutory and Code provisions and rules and parts thereof, in conflict therewith, and shall take effect on and after the second Monday in September, 1914.

HOW PRINTED AND PUBLISHED.

Five thousand copies of these rules shall be printed and published in convenient form, under the supervision of the clerk, who shall certify the same under the seal of the court. He shall mail a copy to each of the judges of the courts of record and a sufficient number to the clerk of the district court in each county to supply a copy to each practicing attorney in his county. On receipt of such copies, the district clerk shall deliver each attorney in his county one copy.

TO THE JUDICIARY AND BAR OF THE STATE:

In other jurisdictions, efforts have been made, from time to time, to simplify procedure in civil actions. Many reports and recommendations of bar associations intended to bring about this result have been examined, and it is gratifying to learn from these sources that our civil code embraces substantially all provisions which members of the bar in other states have recommended to be incorporated in the civil codes of their respective states. Our own code is therefore so complete that it has not seemed advisable to do more than supplement it with a few rules and amendments, which in connection with existing code provisions, it is thought will be of assistance in simplifying procedure

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and thus result in accelerating the disposition of causes and the reduction of expenses to litigants, particularly in the matter of review. In this respect provision is made whereby alleged errors must be fully presented to, and considered, by the trial court and for confining a review to the questions thus presented.

The efficacy of code provisions and rules, however, must to a great extent depend upon their observance by the bar and their enforcement by the courts.

The court desires also to impress upon trial courts, the members of the bar, and the community at large, a clearer appreciation of the power, dignity and responsibility of trial courts, contemplated by the constitution. Original jurisdiction is expressly conferred upon district courts to try all causes, both at law and in equity, whatever their magnitude; while the powers of the supreme court, with certain designated exceptions, are confined to appellate jurisdiction.

The necessity for the exercise of the utmost care by trial courts and counsel in avoiding error, together with the fullest opportunity for correction, is apparent. The careful observance of this duty must tend to reduce the number of cases brought before the supreme court, and to minimize the number of errors in those cases which are by it to be considered, thus tending to a more speedy administration of justice.

The supreme court invites the earnest co-operation of trial courts and members of the bar, in the accomplishment of these purposes, and indulges the hope that the rules and amendments now adopted may be found to be helpful.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

JANUARY, APRIL and SEPTEMBER TERMS, 1914

[No. 7338.]

KINDEL v. COLORADO & SOUTHERN RAILWAY COMPANY.

1. PRACTICE IN SUPREME COURT—*Questions not Determined by the Trial Court*, will not be considered. (4)

2. ——*Cross Errors*—Errors to the prejudice of defendant in error will not be considered when no cross errors are signed. (4)

3. EVIDENCE—*Competency*—Action at common law to recover moneys paid to a carrier for the transportation of coal from certain stations named, to Denver, upon allegation that the rate exacted was excessive.

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Held, that plaintiff was entitled to show the rate charged by defendant upon coal, from the same stations to Denver, when destined to points beyond Denver, and the usual rate for the transportation of coal for substantially the same distance for which that of plaintiff was carried, without first showing that the conditions of the carriage in such instances, were similar to those attending that in question, but subject to the right of the carrier to show dissimilarity in the conditions, as affecting the weight of the evidence, because such dissimilarity was peculiarly within the knowledge of the carrier. (5, 13)

Error to Denver District Court.—HON. GEO. W. ALLEN, Judge.

Mr. CARLE WHITEHEAD, Mr. ALBERT L. VOGL for plantiff in error.

Mr. E. E. WHITTED, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This was an action to recover from the defendant railroad company, the difference between freights paid for the shipment of coal, and what the plaintiff alleged to be a reasonable charge for the service rendered.

The gist of the action is found in the following allegations of the complaint:

"That since July 1, 1907, plaintiff has thus bought and had shipped to him at Denver, Colorado, from various towns in said 'northern coal fields,' to-wit: Louisville, Lafayette and Marshall (all being in the state of Colorado), for use in said business as aforesaid, various and sundry amounts of coal in carload lots, and has paid defendant freight charges for such shipments at the rate of three cents per hundred pounds, or sixty cents per ton, on slack coal, and four cents per hundred pounds, or eighty cents per ton, on coal known as 'mine run,' these being the only kinds of coal so received by plaintiff.

* * *

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"That said rates, charged by defendant and paid by plaintiff as aforesaid, were and are unjust, unreasonable, exorbitant, excessive and unlawful, and that a rate of two cents per hundred pounds, or forty cents per ton, on slack coal and two and two-thirds cents per hundred pounds, or fifty-three and one-third cents per ton on 'mine run' coal for such shipments would have been at all of said times and would still be a just, reasonable and lawful rate; that is to say, plaintiff alleges that two-thirds of the rate actually charged and collected by defendant was and is a just and reasonable rate and that one-third of the rate so charged and of the amount so exacted and collected from plaintiff by defendant as aforesaid was and is unjust, excessive and unlawful."

Judgment was asked for $294.26. The suit was commenced in the county court on the 31st day of August, 1908. Demurrer to the complaint was sustained, and the cause appealed to the district court. The demurrer was overruled in the district court and the defendant required to answer. The answer denied that the rate charged and received was unreasonable, and alleged that the sums of money paid, as set forth in the complaint, were voluntary, without protest, duress or fraud, and represented the regular rate of transportation charged by the defendant for the carriage of such product, and was and is the legal and published rate, as shown by defendant's tariff in effect at the time of said shipments, upon coal from the northern coal fields of Colorado, to Denver. The shipments and sums paid were admitted. The case was tried to the court without a jury. The court declined to permit the plaintiff to introduce certain testimony offered as tending to establish that the rate charged was unreasonable, and likewise as to what was a reasonable rate in such case. Whereupon the plaintiff refused to proceed further and the court directed a verdict for the defendant.

The rejection of this testimony is the only error assigned. Counsel for defendant in error have argued in the briefs the allegation in the answer that the payments

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were voluntary and that for such reason, the action will not lie, but cross error has not been assigned. Neither does it appear that the question was determined by the lower court; so that under the well established rule of this court, this question is not in the case, and therefore is not considered, and expressly not determined.

The specific assignments of error important to be considered are:

"1. In refusing to allow plaintiff to testify what defendant charges to haul coal from Louisville, Colorado, Lafayette, Colorado, and Marshall, Colorado, to Denver, when such coal was destined to some point beyond Denver, and in sustaining defendant's objection to the introduction of said testimony.

"2. In refusing to allow plaintiff to testify as to what is the usual freight rate on coal for twenty and twenty-five mile hauls, and in sustaining defendant's objection to the introduction of said testimony."

Before the rejection of the testimony complained of, the plaintiff had testified in substance as follows:

"That during the years 1907 and 1908, he was engaged in manufacturing bedding, and in compressed air carpet cleaning in the city of Denver; that he used 'Northern Lignite' coal for motive power in said business, because it 'serves our purpose better,' that during those two years he had paid to the defendant the freight charges upon thirty shipments of coal from Louisville, Lafayette and Marshall, Colorado, to Denver, as shown by the freight bills introduced in evidence; that the distance from Louisville, Lafayette and Marshall, Colorado, to Denver was about twenty to twenty-four miles, and that he paid as freight rates upon those thirty shipments eighty cents per ton on 'mine run' coal and sixty cents per ton on slack coal; and that he had made demand upon the defendant for a refund of the excessive charges collected upon these shipments, which demand had been refused; that since that demand had been made the rate on 'mine run' coal had been reduced to seventy cents per ton."

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It will be borne in mind that this is an action at common law, and that the only question to be determined, is as to what constitutes a reasonable rate for the service rendered in the particular case. We are therefore relieved from the construction of federal or state statutes, which are so generally involved in the reported cases upon this subject, and wherein these statutes in themselves, are chiefly controlling.

It will be seen that the matter here involved is confined to a question of the competency of a line of evidence offered in the particular case, not as establishing or in any sense conclusive, but as a fact tending to prove the reasonableness of a rate.

It is contended by the defendant in error, and which contention was apparently sustained by the court, that the rate for coal hauled over the same tracks, by the same company and from the same points to Denver, but destined for delivery at points on the same railroad beyond Denver, may not be taken into consideration as one of the factors entering into a determination of what is a reasonable rate for the services here in question. Also that the rate charged for a similar service by other companies may not be considered for such purpose, unless it first be shown that the conditions are similar, and it would also seem to be contended that this claimed similarity so first to be shown, must cover every fact constituting the alleged similar circumstances, such as cost of transportation, physical value, population, volume of business, and other, if there be other, circumstances entering into the question.

The question as to what facts or circumstances are proper to be considered in reaching a conclusion as to the reasonableness of rates for transportation of commodities, is one that has sorely perplexed the courts and commissions, and is at this time far from being settled.

While the Supreme Court of the United States has in certain cases said what may be considered as properly entering into such consideration, it has not as yet confined the rule to the factors specifically mentioned in

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such cases. And even as to these the want of expert knowledge upon the part of judges has made the general rule thus laid down, in many instances, impracticable of application, and often impossible of compliance. One of the difficulties in this regard was stated in the case of *Marten v. Louisville & N. R. Co.*, 9 Interst. Com. R. 597 where the question of rate comparison was being considered, as here, and where the Interstate Commerce Commission said:

"It is often difficult to say what constitutes a reasonable rate, and more difficult to give in detail the reasons that lead to the conclusion reached. Although the supreme court of the United States has furnished certain rules by which to test the reasonableness of transportation charges, and although this commission has endeavored to apply those rules, yet whenever it has interrogated railway officials as to whether or not they are governed by them when making rates of transportation, they have invariably answered in the negative and said that to do so would be impracticable. The carriers do not apparently possess the necessary data for that purpose and there is at present no other source from which the commission can obtain such data. Under these circumstances to hold that, after substantial dissimilarity of circumstances and conditions has been shown, the longer-distance rate cannot in any case or to any extent be considered by way of comparison in determining whether or not the shorter-distance rate is unreasonable or unduly prejudicial, particularly when, as in this case, competition and other compulsory conditions are not found to justify the whole disparity between the shorter and longer distance rates, would be to reject a most appropriate and necessary test of the reasonableness and justice of railway charges. It seems to us that in a case involving shorter-distance charges higher than those to or from longer-distance points the carrier cannot rightfully claim justification for greater dissimilarity in the rates than may be indicated by the ascertained dissimilarity in circumstances and conditions."

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The last paragraph of this quotation would appear quite clearly to support the contention of the plaintiff in error, as to the admissibility of the testimony suggested in the first assignment of error.

The unpreparedness of courts in this regard at the time the opinion was written (1898) was suggested by Mr. Justice Harlan in the case *Smyth v. Ames,* 169 U. S. 527, 42 L. Ed. 819, 18 Sup. Ct. 426, and wherein he said:

"What are the considerations to which weight must be given when we seek to ascertain the compensation that a railroad company is entitled to receive, and a prohibition upon the receiving of which may be fairly deemed a deprivation by legislative decree of property without due process of law? Undoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people."

The investigations and experience of the Interstate Commerce commission have resulted in a marked advance in the matter of intelligent judicial consideration of this question, until there has developed a tendency upon the part of the courts to permit in evidence any fact, circumstance or condition that may reasonably tend to throw light on the subject, treating the same from the standpoint of weight to be given to such testimony, rather than that of its admissibility.

Indeed, that commission is now regarded by the courts as technical authority in such matters, and its decisions are given great weight and quoted frequently with approval by the Supreme Court of the United States, and other federal courts.

It was said by Judge Taft in the case of *East Tenn. Ry, Co. v Interstate Commerce Commission,* 99 Fed. 64, 39 C. C. A. 425:

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"It has been suggested that traffic managers are much better able, by reason of their knowledge and experience, to fix rates, and to decide what discriminations are justified by the circumstances, than courts. This cannot be conceded, so far as it relates to the Interstate Commerce Commission, which, by reason of the experience of its members in this kind of controversy, and their great opportunity for full information, is, in a sense, an expert tribunal."

Comparison of rates is a usual practice allowed by courts and the Interstate Commerce commission, as one of the matters proper for consideration in the effort to arrive at a conclusion as to questions of reasonableness or discrimination. To make such evidence of material value, however, there must be of necessity some similarity of circumstances or conditions. No rule as to what shall constitute such similarity as will permit consideration for such purpose seems to have been laid down by the courts or the Interstate Commerce Commission, when applied to a rate for the transportation of a specific commodity.

And even when applied to a system of rates between states, the Supreme Court of the United States had considered such facts for what they were worth, as in the very case cited, and relied on by the defendant in error, *Smyth v. Ames, supra,* where the court said:

"Comparisons, therefore, between the rates of two states are of little value, unless all of the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent higher than similar rates in the state of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are, the more business there is. Hence, a mere difference between the rates in two states is of comparatively little significance."

And so in the case of *Interstate Commerce Commis-*

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sion v. Railway Co., 120 Fed. 934, 57 C. C. A. 224, also cited and relied on by defendant in error, where the court after a consideration of the rates submitted in comparison, said:

"The evidence submitted to the commission, supplemented by evidence taken in the circuit court, is not sufficient for us to find affirmatively that the Hampton rates were in and of themselves unreasonable."

While in the first of these two cases the court held that the rates offered in comparison in that particular case were of little value, and in the other case, that the compared rates were insufficient for an affirmative finding, yet in neither case did the court hold that the testimony was not admissible, or that it did not have some value.

In fact no case is cited in the briefs, nor do we know of any from the United States supreme, or federal courts, or the Interstate Commerce Commission, where testimony as to relative rates had been excluded because it was not first shown that conditions were substantially the same as contended by the appellee. But the rule as illustrated by these cases, has been to consider the relative degree of similarity of conditions as going to the weight of the evidence.

The reason for this rule is apparent when we consider the extreme difficulty for a complainant to establish the unreasonableness of a rate in any case, and that so many of the elements entering into such consideration are peculiarly within the knowledge of the carrier.

The practice in this regard is illustrated by the language of the Interstate Commerce Commission in the case of *Cattle Raisers' Association v. M. K. & T. Ry. Co.,* 11 Interst. Com. R. 339:

"The defendants show many rates which are higher than the highest of those attacked by the complaint, but we are furnished with no testimony tending to show similarity of conditions and so far as we are informed such similarity does not exist."

And yet all these rates were introduced in evidence

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and considered in that case. It was further said, that the uniform rule of the commission, as contended by the complainant in this case in its first assignment of error, was:

"In determining a reasonable rate the cost of performing the service, as has been just observed, is one element in that rate and the cost of movement is an important item in arriving at the entire cost of the service. The commission has uniformly held that it was proper to look into the divisions which carriers receive for the purpose of ascertaining the cost of movement since it must be assumed that the railroad would not transport freight ordinarily for less than the cost of the movement, but the division while material testimony for that purpose is not of necessity a standard of comparison by which to estimate a reasonable rate."

The Interstate Commerce Commission has from time to time adopted rules of practice, concerning the questions involved here. These have been followed in so far as it appears, without question by the Supreme Court of the United States. Among these rules, and in addition to those before mentioned, are the following cited in counsel's brief:

"A freight rate can seldom be considered in and of itself. It must be taken almost invariably in relation to, and in connection with, other rates."

The extent to which the commission has gone in this matter of comparison of rates, in its effort to arrive at a conclusion as to whether or not a rate is reasonable, is illustrated by the language used in *Dennison Light and Power Co. v. M. K. & T. Ry.*, 10 Interst. Com. R. 337, as follows:

"We have carefully examined the coal rates prevailing in different parts of the country for similar distances. The rate per ton of 2,000 pounds for a distance of 100 miles prescribed by the railroad commissions of Missouri, Illinois and Iowa is $1.00; that fixed by the Texas commission is .90 when the haul is over one railroad, and $1.05 when two or more railroads participate. While the Minnesota rates are not before us it is our

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recollection that they do not exceed these figures much if at all. Upon the other hand some cases can be found where rates nearly as high as those in question are charged for a similar service, and under circumstances where such charges ought not to exceed, nor indeed equal those which this defendant might make here."

This was a case involving the question of the reasonableness of a rate on the single article of coal, as here. The great difficulty to be met in determining the question of the reasonableness of a rate upon a single article, and the difference as to the relative value of facts to be considered as between such a case, and one wherein a system of rates is involved is well stated in the case of *Central Yellow Pine Association v. Central Illinois Ry. Co.*, 10 Interst. Com. R. 505, where it is said:

"The question of the reasonableness of a rate on a single article of traffic is one of almost insuperable difficulty. In *Smyth v. Ames* (Nebraska's freight rate case), 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418, there was involved an entire system of rates applicable to all traffic on the roads in the state of Nebraska and not the rate on a single commodity or article of traffic. In that case the Supreme Court held that the carrier is entitled to earn a 'fair return upon the value of that which it employs for the public convenience.'

"The value of the entire property of a road employed for the public convenience can shed but little, if any light upon the question whether the rate on a single article among thousands of articles of traffic yields its proper proportion of a fair return on that value. * * * While the Supreme Court has undertaken to point out certain elements to be considered in determining the reasonableness of an entire system of rates, it has not named any as shedding any light upon the reasonableness of a rate in a single commodity like lumber. It is evident that such elements are widely variant in the two cases. Where an entire system of rates is involved, the principal, if not the only question, is whether the revenue yielded by the rates on all traffic is a fair return on the

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value of that which is 'employed for the public convenience'—a question, the determination of which, as we have shown, can only have a very remote, if any practical, bearing on the reasonableness of a rate on a single article of traffic."

It will be seen that in the case of a single rate the value of the entire property of the carrier, so important in the case of a system of rates, becomes of little help in reaching a conclusion, while other rates involving similar shipments becomes of relatively greater importance.

In *Cotting v. Goddard,* 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, which concerned the Kansas statute regulating the rates to be charged by stockyards, the principle contended for by the plaintiff in error in his second assignment of error was approved. Justice Brewer, the writer of the opinion, said:

"It was found, however, that the charges made by the defendant were no greater (and in many instances less) than those of any other stockyards in the country. Nothing is stated to outweigh the significance of that finding. While custom is not controlling, for there may be a custom on the part of all stockyard companies to make excessive charges, yet in the absence of testimony to the contrary, a customary charge should be regarded as reasonable and rightful."

The plaintiff in the case at bar attempted to prove the usual and customary rate for the same article and for a like distance. "Absence of testimony to the contrary," as used by Judge Brewer, can have no other meaning than to concede the right and impose the duty upon the defendant to make such showing, and to thereby weaken or destroy the weight of the evidence as to such custom, as the facts may justify.

Counsel for defendant in error cite *Hopper v. Railway,* 91 Iowa 639, 60 N. W. 487, and *Anniston v. Southern Railway Co.,* 145 Ala. 351, 40 So. 965, to sustain their contention. These cases do apparently support such position as to the second assignment of error. But the rates there sought to be introduced were not confined to

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hauls of the same or like distances as is the present instance, nor of even relative length. While in this case the customary or usual rates offered were for relatively the same distances of twenty to twenty-four miles and upon the same commodity. But if these cases can be said to support the contention of defendant in error, we must decline to follow them as being contrary to the great weight of authority and likewise opposed to sound reason. As against these cases, is that of *Halliday Milling Co. v. La. & N. W. Ry. Co.*, 80 Ark. 536, 98 S. W. 374, which was, as is the case at bar, a common law action to recover excessive rates charged and paid, and where it was held:

"The evidence of through rates and the division thereof on both ends, of appellee's line was also admissible. It would be fair to deduce therefrom that the appellee would not agree to maintain rates which were not fair and compensatory to itself, as well as reasonable for the services rendered. Of course, none of these matters was controlling, and it was open to appellee (railway company) to remove them by a weight of evidence or to explain them, but the facts adduced were competent and sufficient to go to a jury as tending to prove the matters charged, and the case should have been sent to the jury, unless the matters urged by appellee presented legal obstacle."

It seems clear that comparative rates for the same commodity and for like distance is a sufficient similar service to permit the introduction thereof as testimony, subject to the right of the carrier to show matters of dissimilarity, if any there be, and as affecting the weight of such evidence.

It was within the right of the defendant in this case, to show any dissimilar circumstances, and conditions affecting the rates offered by the plaintiff in comparison, as would tend to lessen the weight of such testimony, as for instance, if the expense of the transportation be greater than that of the rate so offered in comparison; the difference in cost of construction and operation, the volume of business or any other matter which may rea-

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sonably tend to effect the value of such compared rate, as evidence in the case.

For these reasons the judgment of the district court is reversed.

In department.

MUSSER, C. J., and GARRIGUES, J., concurring.

[No. 7549.]

DIVIDE CANAL & RESERVOIR CO. v. TENNEY.

1. CONTRACTS—*Ratification*—The alteration of a contract previously put in writing may be ratified, either by express words or by implication from facts which exclude any other conclusion. By a contract between plaintiff and the Divide Ditch Company, predecessor of defendant, as originally framed, plaintiff conveyed to said company "all rights * * * secured by the appropriation of water from Columbine creek," and said company agreed "to measure the water which may be secured * * * by the Columbine ditch," and pay plaintiff annually, at a certain rate, for one-third of said water, in excess of what, under another provision, it might deliver to him; but the president of the corporation, having before that obtained from plaintiff a conveyance of all his interest in the Columbine ditch, and the appropriation of water thereby made, before delivery of the contract, struck out all words relating to the Columbine ditch and the appropriation thereby, and in a letter transmitting the contract so amended, to plaintiff, expressly called attention to this erasure, declaring that this was never in the agreement. Plaintiff made no objection to this erasure until nearly four years later. Meantime the Divide company and its successors, had, at large expense, completed the Columbine ditch, plaintiff being at the time aware of the work so carried on. *Held*. that by his acquiescence plaintiff had ratified the erasure. (19)

2. ——*Construed*—By an agreement between plaintiff and the Divide company, predecessor of the defendant, plaintiff assigned to that company "all rights * * * secured by the appropriation of water by said company from Sand creek and Dead Man's creek," and the company agreed to measure the water secured by the Divide ditch, and pay plaintiff, annually, at a certain rate, for a certain part of these waters. *Held*,

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that plaintiff was not entitled to an allowance for any share of any water except the appropriations which he transferred. (20)

3. PLEADINGS—*Contracts Set Out in Haec Verba*—Action upon a contract. The answer denied the contract and set out *in haec verba* what it alleged was in fact the agreement. *Held*, that defendant was entitled to show that the contract set up in the answer was in truth, that upon which the minds of the parties met; the fact that the contract as pleaded by defendant was identical with that alleged by plaintiff, save as to a certain erasure made before delivery, did not require any different or more particular method of averment than that adopted by the answer. (21)

Appeal from Larimer District Court.—HON. HARRY P. GAMBLE, Judge.

Mr. JAMES W. M'CREERY and Mr. DONALD C. M'CREERY, for appellant.

Messrs. LEE & AYLESWORTH, for appellee.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Appellee, as plaintiff, brought suit against appellant, as defendant. His complaint included several causes of action. There was judgment for plaintiff and defendant appeals.

The first cause of action was to quiet plaintiff's title to an interest which he claimed in water delivered by means of the Columbine ditch, and was based on a contract between plaintiff and the Divide Ditch Company, dated November 21st, 1901, wherein it was recited that the ditch company, in consideration of certain acts therein specified to be performed by plaintiff, agreed to deliver him, free of all expense, water sufficient for the irrigation of lands particularly described. The contract further recited that the company agreed to measure the water which might be secured by the Divide and Columbine ditches and determine what was the full one-third of such water and pay plaintiff annually on the 1st day

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of November of each year $6.00 per million cubic feet for all of the one-third of the water delivered by these ditches in excess of the amount furnished for the irrigation of plaintiff's land. The contract also recited that plaintiff, in consideration of the covenants on the part of the defendant:

"By these presents does sell, convey and assign unto the said Divide Ditch Company the entire undivided one-third interest in and to all of the rights, privileges and franchises pertaining to and secured by the appropriations of water by said company from those streams known as Sand creek and Deadman creek in said Larimer county (and also all of the rights, privileges and franchises pertaining to and secured by the appropriation of water from the Columbine creek in said Larimer county)."

This contract is somewhat inartificial and ambiguous but it appears therefrom, and from the testimony, that plaintiff was the owner of an interest in the property conveyed, and that the consideration for such conveyance was the covenant on the part of the Divide Ditch Company to deliver him one-third of the water annually derived from the appropriations mentioned in the contract, for the irrigation of his land therein described, and in case he did not use or require all of this volume he was to receive $6.00 per million cubic feet for the difference between the amount he used to irrigate his land, and the full one-third of the water obtained and diverted each year from these sources. About February 15th, 1904, the Divide Ditch Company transferred the rights acquired under the contract to the defendant company. The defendant denied the contract as pleaded, which was set out, *haec verba,* in the complaint, and set up as the contract between the parties an agreement which contains no reference to the Columbine ditch. It appears from the testimony that the contract set out by the plaintiff was taken by the late Governor Eaton, then the president of the Divide Ditch Company. November 4th, 1902, plaintiff wrote a letter to Eaton, in which he stated:

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"I am compelled to again ask you for the contract relative to the Sand Creek ditch."

A few days later Eaton replied:

"Inclosed please find contract as requested. I went to the County Clerk's records this morning and failed to find the recorded contract. Then I came up here and found the contract that I had and in that contract the Columbine was included and I have taken the liberty to scratch it out as that was never in our agreement."

The erasures made covered that portion of the contract as above quoted enclosed in parenthesis and also all reference to the Columbine ditch in other parts of the instrument. January 11th, 1907, plaintiff recorded the contract sent by Eaton with the erasures as made by him and also the letter written by Eaton. The only difference between the contracts pleaded by the respective parties is that in the one relied upon by plaintiff it is pleaded as though no erasures had been made while on the part of the defendant it was claimed that the contract between them was the one in which the erasures were made. The question thus presented is, which was the true contract between the parties, that is, whether the contract as changed by the erasures is the one by which the plaintiff is bound, or whether the defendant is bound by the contract as originally drafted. This becomes important, for the reason that plaintiff, under the contract as originally drafted was entitled to one-third of all the water carried annually by the divide ditch, from the appropriations he conveyed, including the volume diverted through the Columbine ditch, from its appropriations, when, under the contract after the erasures were made all consideration of that ditch and its appropriations would be excluded. Whether then plaintiff was or was not entitled to one-third of the water diverted by the Columbine ditch depends upon whether he is bound by the contract after it was changed by the erasures made by Eaton. This must be determined from the facts and the principles of law applicable thereto.

Plaintiff and one Wilson commenced the construc-

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tion of a ditch, the purpose of which was to divert water from the creeks named in the contract into the Cache La Poudre river. Before this work was completed Wilson conveyed a part of his interest in the system to the Divide Ditch Company and the remainder to plaintiff. Later plaintiff entered into the contract set out in his complaint. As above stated, all reference to the Columbine ditch and its appropriations were thereafter stricken from this contract by Eaton. It does not appear that plaintiff, when he received the contract from Eaton, in which all reference to the Columbine ditch and its appropriations were erased, objected to the erasures, although his attention was directly called to them by the letter accompanying it; the reason for the erasure being, as stated in the letter, that the Columbine ditch "was never in our agreement." The Divide Ditch Company commenced to construct the ditch intended to utilize the purchase from Wilson and plaintiff, but it was not entirely completed until after February, 1904, at which date it was conveyed to the defendant company and thereafter fully completed by the latter. It appears that plaintiff was aware of the work being carried on by defendant and its predecessor and that the first objection he made to the erasures was in November 1906, when a statement showing the amount of water run in the ditch, which did not mention the Columbine, was handed to him. It also appears that on May 1st 1902, by quit-claim deed recorded five days later, he conveyed to Eaton, as recited therein:

"The right of way for that certain ditch known as the Columbine ditch, located in section twenty-six in Tp 10 N R 75 West with all rights to the appropriation of water and any and all interests therein."

This is the same property which he claimed was included in the contract as originally drafted. By mesne conveyances the rights thus acquired by Eaton became vested in the defendant.

A material alteration in a written instrument may be ratified after it has been executed and delivered, and if so ratified will bind the parties; 7 Am. & Eng. Encyc.

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of Law 144. Ratification may be express or it may arise by implication. If it is to be implied, facts must be established from which it necessarily results; *Idem.* Plaintiff did not expressly assent to the change in the contract and the question therefore is, did he impliedly do so? He knew of the change but did not object. He knew that after the change work was being prosecuted on the ditch system by his vendee, and its successor, the defendant. He remained silent for about four years and then, when a statement was rendered showing the volume of water he was entitled to receive royalty upon, which excluded the Columbine ditch, objected for the first time by claiming that he should be paid for water diverted by the Columbine ditch.

Prior to the change he had parted with his interest in the Columbine ditch by conveyance to Eaton. This situation explains his silence and clearly manifested an intention on his part to ratify the contract as changed, for the very obvious reason that the facts as they existed at the time of the change required that the Columbine ditch should be excluded from the contract. Without any objection from plaintiff relative to the change, the ditch system was completed by the defendant and its predecessor. The silence of the plaintiff in these circumstances would naturally cause the Divide company as well as the defendant to conclude that the work of completing the system was being prosecuted with the understanding on their part and the part of the plaintiff that the contract as modified by the erasures evidenced the agreement between them and calls for the application of the legal maxim that, "He who is silent appears to consent."

It is settled law that if a party by conduct has intimated that he consents to an act which has been done, or will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he can not question the legality of the act he has so sanctioned to the prejudice of those who have acted on the fair inference to be drawn

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from his conduct. *Truesdail v. Ward,* 24 Mich. 117. We must therefore hold from the undisputed facts that plaintiff assented to the change in the contract made by the erasures and is bound thereby as it read after this change was made.

The trial court, however, held by the judgment rendered that the contract without the erasures was the agreement between the parties, and decreed that plaintiff's right to water diverted by the Columbine ditch be quieted, and assessed damages for the failure of defendant to account to and pay him for his share of the water carried in this ditch. This we think was error for the reasons above stated.

Plaintiff also claimed and was awarded damages upon the ground that for the years 1906 and 1907 the defendant, without authority, had deducted from the volume carried by the Divide ditch 48 cubic feet per second of time, and for the year 1908, 21 cubic feet, thus reducing the volume to which the plaintiff claimed he was entitled to be paid for under his contract with the company. The testimony discloses that this water did not belong to the company, nor was it diverted for its use but that it represented water from appropriations made in Wyoming, which one Bruce G. Eaton claimed to have purchased, and that it was carried through the ditch system of defendant for his use and benefit. It may be that Eaton was without right to this water and could not lawfully divert it, but this is immaterial. Plaintiff certainly was not entitled to any portion of it except he established that it belonged to the company. This he failed to do. Independent of this, plaintiff is precluded from asserting any claim to this water, for the reason that the contract does not contemplate that he was to share in water except from the appropriations which he transferred.

The remaining question relates to the judgment awarding damages on the third cause of action. The averments of the complaint with respect to this cause are to the effect that for the year 1905 the defendant requested the plaintiff to rent a sufficient number of shares

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of the North Poudre Irrigation Company stock for the proper irrigation of his land, described in the contract between himself and the Divide company; that, acting on this request, he rented such stock at an expense of $350.00, which defendant has refused to pay. The court found in favor of plaintiff on this cause of action. Without going into details we think the testimony sustains the agreement pleaded and that the judgment of the court, awarding the plaintiff the amount of the obligation he incurred in renting the stock, is supported by the evidence. The judgment of the district court on this cause of action is affirmed.

Except as to this cause of action the judgment of the district court is reversed and the cause remanded for further proceedings in harmony with the views expressed in this opinion.

Two-thirds of the costs in this court will be taxed to appellee and one-third to appellant.

Judgment affirmed in part and reversed in part, and the cause remanded.

CHIEF JUSTICE MUSSER and MR. JUSTICE HILL concur.

On Petition for Rehearing.

MR. JUSTICE GABBERT delivered the opinion of the court:

In their brief for rehearing counsel for plaintiff contend, that under the pleadings the question of his consent to the changes in the contract was not presented because defendant did not plead a substitute agreement or the assent of plaintiff to the erasures. By answer, the defendant denied the contract set out in the complaint, and pleaded *haec verba*, the contract upon which it relied. Evidence to establish a contract need not be pleaded. Defendant having specifically set up the contract upon which it relied, could show that this instrument was the

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one between the parties by assent to changes in the contract relied upon by plaintiff after it was executed, for the reason that this was merely testimony to establish the contract pleaded by defendant.

From the testimony the Wyoming water is in no sense involved. Plaintiff's rights are confined to the appropriations he transferred and as defined in his contract. His contract does not purport to give him any other interest. It is therefore wholly immaterial from what source or by what means additional water is secured by defendant or carried through its ditch, so long as by so doing plaintiff's rights under his contract are not infringed, or defendant does not refuse to comply with the terms and conditions of that contract to his damage.

We have determined the case on the record before us, but this does not preclude either party on retrial, from introducing competent testimony which might establish facts different from those now presented.

The petition for rehearing is denied.

Rehearing denied.

CHIEF JUSTICE MUSSER and MR. JUSTICE HILL concur.

[No. 8143.]

OSTLING, CITY TREASURER OF LEADVILLE, v. THE PEOPLE EX REL.

MUNICIPAL CORPORATIONS—*Annual Revenue to be Applied to Annual Expenses*—Under Rev. Stat. secs. 6631-6633, the annual revenue of every municipal corporation must be applied to discharge the expenses of the corporation during the year in which it is raised, and may not be applied to any other purpose, until the expenses of the year to which the funds belong have been satisfied. (27, 28)

Secs. 6644, 6645, 6647, are to be construed in connection with section 6631, and so construed merely require that warrants drawn on the funds of a particular year must be paid in the order of registration, out of the funds of that year applicable to the purpose. *People v. Austin*, 11 Colo. 134, distinguished. (28)

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Error to Lake District Court.—Hon. CHARLES CAVVENDER, Judge.

Mr. JOHN M. MAXWELL, and Mr. R. D. MCLEOD, for plaintiffs in error.

Messrs. HOGAN & BONNER, for defendant in error.

Defendant in error as relator instituted an action in mandamus against plaintiff in error, treasurer of the city of Leadville, and others, as respondents, the purpose of which was to compel the treasurer to apply funds in her hands to the payment of city warrants held by relator. Judgment was rendered in favor of relator and respondents have brought the case here for review on error.

In the alternative writ it was alleged that relator was the holder of legal warrants of the city which had been duly issued and registered. It set out a list of such warrants, 72 in number, giving date of issue and registration, and the number and amount of each warrant, the number of the first being 8242, in the sum of $304.25, dated December 9th, 1908, and registered the following day, all aggregating over $5,500.00, the last of which was dated August 3, 1912, and registered May 6, 1913. It stated that the total amount of unpaid warrants of the city, including those held by relator, approximated $264,000.00, and that during the past thirty years the city, within the last quarter of each fiscal year, had passed an ordinance termed the "Annual Appropriation Bill," in and by which such sums as were necessary to defray the expenses and liabilities of the city for such fiscal year were appropriated, and alleged that the city council never added to the corporate expenses, in any one year, any amount in excess of the annual appropriation; that during all the times mentioned the treasurer, at the end of each month, made a report to the council, of the balance in the treasury, as required by law, and that all the warrants held by relator were drawn upon the treasurer of the city, in which was stated the particular funds upon

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which they were drawn, and that during all the times mentioned in the writ, whenever the city treasurer had funds on hand to the amount of $500.00 or over, such treasurer applied such funds to the redemption of an equal amount of such outstanding warrants as were entitled to preference as to payment, according to the order of time in which they had been registered. It was then alleged that the city treasurer had informed relator that she now had on hand funds to an amount of $500.00 and over, which should be applied to the redemption of warrants as provided by law, but stated that she would not issue calls for warrants, for the reason that the city council had instructed her that they intended to apply the current revenue of the city to the payment of current expenses for the fiscal year beginning April 13, 1913. There is then set out the form of warrant adopted by the council, from which it appears, in connection with the resolution adopting such form, that it was the purpose of the city to issue warrants for current expenses thereafter incurred, payable out of the funds realized from taxes and all other sources of revenue for the fiscal year beginning in April, 1913. For return the respondent answered that the warrants held by relator were issued at a time when the indebtedness of the city was in excess of the amount which it could lawfully incur, and that therefore they were invalid, and alleged that no appropriation was made in 1913 for the payment of outstanding warrants issued prior to the fiscal year beginning that date. To this return relator replied putting in issue the affirmative defenses of the respondents. The cause was submitted to the court on an agreed statement of facts from which it appears that the relator was the owner of warrant No. 8242, and others, issued in the respective sums named in the alternative writ, and dated and registered as therein alleged, and except for the institution of this action the respondents would have used the funds in cash on hand in the city treasury for the payment of the immediate current expenses of the city, regardless of the outstanding unpaid, registered warrants; that No. 8242 was

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drawn on the street lighting fund for November, 1908; that the other warrants were issued at different dates, to different payees, for different amounts, and were drawn on different funds, and registered at different times; that all were drawn during fiscal periods prior to the fiscal year beginning in 1913, and that the appropriation bill for 1913 was to defray the expenses of the city for the fiscal year beginning in April of that year. It was further stipulated that during all the times mentioned in the alternative writ the city had outstanding registered warrants amounting to approximatelyl $250,000.00 face value; that these warrants were issued for salaries and current expenses, and that the amount of such outstanding warrants during this period exceeded three per cent of the assessed valuation of the taxable property in the city, such valuation being substantially the sum of $2,-100,000.00. In brief, from the pleadings and the stipulation of facts the city challenges the right of the relator to have the funds in the hands of its treasurer, realized and to be realized from the revenues for the fiscal year beginning April, 1913, applied to the payment of such warrants, and claims the right to use such funds to discharge warrants drawn to meet current expenses for that period.

Mr. JUSTICE GABBERT delivered the opinion of the court:

From the foregoing statement it appears that the object of the action instituted by relator is to compel the payment of outstanding registered warrants in the order of registration, out of funds realized from the revenue for the fiscal year beginning in April, 1913; that all the warrants held by relator were issued and registered prior to the beginning of that fiscal year; that the appropriation of funds made by the city authorities for such year was to meet the current expenses of that period, and that no appropriation was made to discharge warrants issued during any previous period.

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The argument of counsel has been mainly directed to the question of the validity of the warrants involved, it being contended by counsel for respondents that they are invalid, because they represent indebtedness incurred in excess of the constitutional and statutory limitation which cities are authorized to contract, while on the part of the relator it is claimed that the pleadings and agreed statement of facts disclose that the limit of indebtedness had not been reached when such warrants were issued. If, as claimed by counsel for respondents, such warrants are invalid, for the reason assigned, relator can not maintain his action, but should it appear that he is not entitled to have his warrants, even if valid, paid, out of the moneys appropriated and realized from the taxes and other sources of revenue for the fiscal year beginning in April, 1913, the question of their validity is of no moment in this case, and should not be determined.

Section 6631 of the Revised Statutes of 1908, is as follows:

"The fiscal year of each city or town organized under this act shall commence on the first day of April in each year, or at such other time as may be fixed by ordinance. The city council of cities and boards of trustees in towns shall, within the last quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or town, either by a petition signed by them, or at a general or special election duly called therefor. Nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year."

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By the two sections immediately following the city authorities are inhibited from adding to the municipal expenditures of any one year anything over and above the amount provided for in the annual appropriation bill of that year; that no expenditure for an improvement to be paid out of the general fund shall exceed in any one year the amount provided for such improvement in the annual appropriation bill, and that no expense shall be incurred unless an appropriation has been made to meet it. There are certain exceptions which are not pertinent to any question involved in this case. The purpose of these statutes is to require municipal corporations to make provision whereby they will be enabled to adopt the policy, "Pay as you go," and to restrict the expenditures each fiscal year to the annual revenue for that period. This being the policy and purpose of the statute it must necessarily follow that the annual funds are applicable to the annual expenses when appropriated in advance for that purpose, and that the funds of one year, so set apart, may not be applied to the expenses of any other year, until all the expenses of the year to which the funds belong have been satisfied. In other words, the object of these statutory provisions is to permit a city to appropriate and apply its current revenues to the discharge of its current expenses, a course absolutely necessary to the accomplishment of the purposes for which it was created.

It appears to be urged in the briefs that because of the statutory provisions regarding the registration of warrants, the order in which they shall be paid, and calls for redemption, that warrants must be paid in the order of registration whenever there is cash in the hands of the treasurer in the sum of five hundred dollars or over to the credit of the funds upon which outstanding warrants are drawn, without regard to any particular revenue for any particular year from which such funds may have been derived. These provisions are to the effect that the treasurer of every city shall keep a register of warrants in which shall be entered the number and amount of each

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warrant, the date of presentation and name of the person presenting it, and the particular fund upon which it is drawn—section 6644, Revised Statutes of 1908. That every fund shall be disbursed in taking up warrants drawn thereon in the order registered. Section 6645. And that the treasurer when he has on hand cash in a specific sum, or over, to the credit of any particular fund shall call in warrants payable out of such fund, in the order of their registration, section 6647. These statutory provisions, when considered in connection with section 6631, merely require that warrants drawn on the fund of a particular fiscal year must be paid in the order of registration out of the funds of that year applicable to that purpose. A contrary construction would lead to an anomalous result. In express terms section 6631, *supra*, requires municipal authorities to make in advance appropriations for each fiscal year to meet current expenses for that period. It further requires such authorities to specify the objects for which such appropriations are made and the amount appropriated for each object, and should it be held that such appropriations must be applied to the payment of outstanding registered warrants of previous years the municipal authorities in one breath are required to make an appropriation for a specified period and purposes, and in the next to apply the funds so appropriated to an entirely different purpose. All warrants held by relator were issued for expenses incurred by the city for fiscal periods prior to the fiscal year beginning in April, 1913, and we therefore conclude in the circumstances of this case that he is not entitled to have any of the funds realized from revenues for that fiscal year applied upon his warrants. In principle and by analogy we think the case of *Kephart v. People,* 28 Colo. 74, 62 Pac. 946, sustains this conclusion. In that case it was held that to justify a mandamus against the state treasurer to pay a state warrant it must affirmatively appear in the alternative writ that there is money in he hands of the treasurer belonging to the specific fund against which the warrant is drawn, and which came

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from the revenue of that particular year, and that there are no other warrants entitled to prior payment sufficient to exhaust such fund.

As applicable to the facts of this case, the general rule is that a cause of action does not exist against a city on a warrant until a fund for its payment has been collected; *Forbes v. Grand County,* 23 Colo. 344, 47 Pac. 388. The fact that the revenues for a particular year are inadequate to meet the warrants for that year, payable out of such revenues, does not render the city liable thereon until a fund, which can be applied to their payment, is raised, or might have been, in the manner provided by law; *supra.* Persons purchasing such obligations take them subject to the mode of payment that the general assembly has provided; *Stryker v. County Commissioners of Grand County,* 77 Fed. 567, 23 U. S. C. C. A. 286.

Our conclusion that relator is not entitled to have funds realized from the revenues for the fiscal year beginning in April, 1913, applied upon his warrants, is in no sense in conflict with any previous decision of this court. The authority of county commissioners to appropriate funds to the payment of current expenses of a particular year, to the exclusion of warrants issued in previous years, was involved in the *People ex rel. v. Austin,* 11 Colo. 134, 17 Pac. 485. It was there held that section 637, General Statutes, which provided that county warrants should be entitled to a preference as to payment, according to the order of time in which they were presented to the county treasurer, entered into and formed a part of such warrants, and therefore the county was bound to give precedence to the payment of all warrants as the statute provided. The warrants there involved, however, were issued when there was no law, as now (sections 1215, 1216 and 1217, Revised Statutes 1908), requiring county commissioners to make an appropriation for each fiscal year, limiting the annual expenditures to such appropriations, and providing that no liability should be created against a county except an appropriation had been made to meet it; consequently

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county warrants were not and could not be drawn on the revenues of any particular year, and hence were payable out of the funds in the hands of the treasurer belonging to the fund upon which they were drawn, without reference to the tax levy from which such funds had been derived. The difference between the statutory provisions with respect to county warrants in existence at the time the *Austin* case was decided, and the provisions on the subject of city warrants to which we have referred, clearly distinguishes it from the case at bar, for the reason that by these latter provisions the holder of a valid warrant issued by a city for current expenses of a fiscal year is entitled to be paid out of the revenues of that year, appropriated for that purpose. This is a part of the contract by virtue of the statute, and to hold that his rights thus fixed would be subject to the payment of warrants issued in previous years would impair the obligation of his contract.

The real question in the case is whether relator is entitled to have the revenues for the fiscal year beginning in April, 1913, applied to the payment of his warrants. We have determined that he is not, for reasons to which counsel have given little or no attention in their briefs, and perhaps at variance with their views on the subject, but we think we are justified in deciding the case upon the grounds stated, without expressing any opinion on the validity of the outstanding warrants of the city issued prior to the fiscal year beginning in April, 1913, as that question is of such supreme importance to both the city and warrant holders that it should not be determined until it becomes absolutely necessary to do so.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the action at the cost of relator.

Judgment reversed and cause remanded with directions to dismiss.

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Decision *en banc.*

CHIEF JUSTICE MUSSER not participating.

[No. 6438.]

IRONSTONE DITCH COMPANY ET ALS. v. ASHENFELTER ET ALS.

1. WATER RIGHTS—*Adjudication of Priorities—Effect of Decree*—A decree under the statute (Rev. Stat., §§ 3276-3306) adjudicating the priorities to the use of water settles everything necessary to complete appropriation and binds all those participating in the proceeding. (39)

2. ——*Nature of the Right—Alienation—Change of Use or Place*—The right to the enjoyment of water for a beneficial purpose is not confined to the particular land where the water is first applied; it may be alienated, independently of the land, and changed from place to place, with the single limitation that the change shall not injuriously affect the vested rights of others. (39, 40)

The change must, however, receive judicial sanction by proceedings under the statute. (Rev. Stat. § 3226.) (40)

The evidence examined and held that the transfer of a volume of water from the original point of diversion, to a point miles up the stream was beneficial rather than injurious to those protesting. (45,-46)

3. ——*Seepage Water—Appropriation*—Under Rev. Stat. § 3177, seepage water which is being wasted is the subject of appropriation. The appropriation thereof is not included in or controlled by a prior adjudication decree in the same district. (42)

4. ——*Use of Stream as a Conduit*—Whoever has developed water from a source extraneous to the stream may discharge it into the stream, and, using the stream as a conduit withdraw it below. (44)

Appeal from Montrose District Court.—Hon SPRIGG SHACKLEFORD, Judge.

Mr. T. J. BLACK, Mr. S. S. SHERMAN, Mr. MILTON R. WELCH, for appellants.

Messrs. BELL, CATLIN, BLAKE & MOTHERSILL, Messrs.

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STORY & STORY, Mr. JOHN GRAY, Mr. MILLARD FAIRLAMB, for appellees.

Mr. JUSTICE GARRIGUES delivered the opinion of the court.

This case involves a transfer on the Uncompahgre river, of early priorities from ditches located down the stream in the neighborhood of Delta, up the stream, above the city of Montrose, into the Montrose & Delta canal, called the Montrose canal, and is the sequel of *Ashenfelter v. Carpenter* and *Gutshall v. Carpenter,* Nos. 4834 and 4862, 37 Colo. 534 and 536, 87 Pac. 800, 801. The court entered a permissive decree allowing the change, and protestants bring the case here on appeal.

1. November, 1888, the general adjudication decree entered in the district court at Montrose settled the priorities of all the ditches in water district No. 41, involved in this controversy, diverting water for irrigation from the Uncompahgre river. This decree awarded the Boles & Manney ditch No. 1½, priority 1½ for 3.22, the Eggleston No. 2, priority No. 2 for 6, the Uncompahgre No. 3, priority No. 3 for 12, the Homestake No. 4, priority No. 4 for 11, and Delta No. 11, priority No. 11 for 15 cubic feet per second. There is no ditch or priority No. 1. The headgates of these early ditches are located down the stream, near its junction with the Gunnison river, while the headgate of the Montrose canal is located upstream, some 25 or 30 miles. The headgate of the Uncompahgre ditch No. 3, taken for illustration, as an initial point, is on the east side of the river, and about 3 miles above the junction; Eggleston No. 2 is on the west side and about a quarter of a mile above No. 3; Homestake No. 4 is some 6 or 7 miles above No. 3 near Olathe; Boles & Manney No. 1½ is about a quarter of a mile above No. 2; the Rustler is about 4½ miles above No. 2; Delta No. 11 is about three-quarters of a mile below No. 3. These ditches and priorities are referred to in the briefs and evidence, and seem

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to be known better locally, by their numbers than their names, as 1½, 2, 3, 4, 11, etc. For convenience, the diverse applications to change the points of diversion will be arranged into three groups: First, those made by persons desiring to change 2 and 3 priorities from 2 and 3 headgates into the Montrose canal; second, the application of Gutshall to change .6 of a foot from No. 2, and 5 5/14 feet from No. 11 into the Rustler ditch about 4½ miles above No. 2; and third, the application of John and Jesse Bell to change 3.3 feet from No. 4 (Homestake) into the Montrose canal. The headgates of the Eggleston and Uncompahgre ditches (priorities 2 and 3, for 6 and 12 feet respectively) are about 1½ or 2 miles above the town of Delta and very close together. The storm center of this litigation is around the transfer of these 2 and 3 priorities, and while the transfer of Homestake priority No. 4 water by the Bells into the Montrose canal, and the transfer of Delta No. 11 water by Gutshall into the Rustler are involved, our attention will be directed to the transfers of 2 and 3, as the determination of the right to make these changes is controlling of the whole controversy involved, not only in this, but also in the *Moore* case, No. 5891, as well. The priorities of the protesting ditches are ahead of the Montrose canal, but are junior to 2 and 3, and they are located principally below the city of Montrose and above the headgates of 2 and 3; that is, protestants' headgates are located between the old and new points of diversion, and are so situated that their ditches consume all the accretions above 2 and 3.

The Uncompahgre river heads in Ouray county in the East Elk or Saw Tooth range of mountains, where it is fed by melting snow, and running northerly from Ouray, empties into the Gunnison just below the town of Delta. During the June flood all the ditches have a sufficient supply without observing the decrees, and water runs to waste; but later in the season the normal flow is so low that water for irrigation is scarce, and it becomes necessary for the officials to enforce the decreed priorities. The Montrose canal crosses the bottom, and

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reaches the top of Spring creek mesa on the west side, where it irrigates extensive farms and fruit orchards. The original owners of the early ditch priorities held their rights to the use of the water in severalty. During 1896 and 1898, most of the 18 feet decreed to 2 and 3 was purchased from the divers individual owners by farmers and horticulturists, who caused it to be transferred from 2 and 3 to the Montrose canal, for their use on Spring creek mesa. These changes in the point of diversion were perfected at the time of the sale of the water rights, and the state engineer, the irrigation division engineer of the water division, and the water commissioner of district No. 41, assisted in making the transfers, and delivered the water into the Montrose canal until 1904, when the water commissioner refused longer to recognize the transfers, until the decree authorizing and permitting the change in the point of diversion required by the statute, had been obtained. The purchasers of this water contended that the statute regarding the transfer of decreed rights (Laws of 1903, p. 278) was prospective and not retrospective, and did not apply to them, and in 1904 brought an injunction suit against the water commissioner of 41, to restrain him from taking the transferred water out of the Montrose canal, or from refusing to divert it into the canal headgate. This injunction suit was decided against them on demurrer, and they appealed the case to this court. Some time during the happening of these events, or at least about this time, Thomas M. Moore and others, who had purchased from the original owners some of this early priority water, filed petitions in the district court, to change its point of diversion into the Montrose canal. While the *Moore* case was pending, and after the demurrer to the injunction suit was sustained, and judgment entered against them below, appellees in this case filed in the district court at Montrose, petitions asking to change the point of diversion of the water they had theretofore purchased, or to confirm the transfers already made. These petitions were consol-

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idated for hearing and tried with the *Moore* proceeding; but before any action was taken thereon, they obtained an order permitting them to withdraw from the *Moore* case, dismissed their petitions therein in the district court, and appealed the original injunction suit, which had been decided against them on demurrer, to this court. (See 37 Colo. 534-36.) The *Moore* case was tried, the applications therein to change the point of diversion were denied, and they appealed that case which is No. 5891, to this court. The injunction suit was affirmed by us, but without prejudice to the right of appellees to bring and maintain subsequent proceedings, under the statute, to change the point of diversion. Thereupon appellees, as petitioners began another proceeding in the district court at Montrose in April, 1907, asking the court to permit a change in the point of diversion, or to confirm the change already perfected. A referee was appointed who took the evidence and reported his findings. By stipulation the bill of exceptions, which preserved the evidence in the *Moore* case, was received in evidence in this case, together with such additional testimony as the parties saw fit to introduce. The referee found appellees owned the transferred water; that they purchased it between April, 1896 and November, 1898, from the original priority owners, and immediately thereafter changed the point of diversion from the headgates where it was originally decreed, to the headgate of the Montrose canal where it has since been continuously used by them in connection with the cultivation of their lands; that the change was not only without injury to protestants and all others on the river, but beneficial to them, and found petitioners were entitled to a decree permitting the change, which findings the court approved and entered a decree accordingly.

Spring creek mesa, upón which the water is used, consists of about 8,000 acres of table land, at an elevation of some 80 to 100 feet above the river bottom. The soil is a light, fertile loam, underlain with a bed of gravel, resting upon an impervious shale. Numerous ravines and draws, which drain into the river, traverse the mesa,

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and Spring creek, skirting its western boundary, empties into the river some 5 or 6 miles below Montrose. Water spread upon the mesa in irrigation sinks rapidly through the loam and gravel until it is stopped by the shale, and the gravel bed filling with water becomes a large underground reservoir. It then breaks out in springs along Spring creek, and in the draws, gulleys, and ravines, and is carried back into the river. Also at places above the mouth of Spring creek the river runs in against the bluffs or cliffs of the mesa, and the seepage water is carried along the floor of the shale, directly into the river. It is estimated that a great percentage of the water spread upon the mesa in irrigation is in this way returned to the river between the river bridge, west of Montrose, and the mouth of Spring creek, a distance of some 5 or 6 miles. During times of scarcity late in the season, the normal flow of the river past the Montrose headgate was about 40 or 50 feet, and most of this disappeared in the sand between the headgate and Montrose, the greatest loss occurring at what the witnesses designate the "dry bar," about 2 miles above the city, where the water was lost with no visible indications that it reappeared further down the river. On the east side there is no available seepage into the river, and below the mouth of Spring creek, on the west side, that is between the mouth of Spring creek and the headgates of 2 and 3, a distance of some 10 or 15 miles, there is no seepage into the river. While there is some seepage between the Montrose canal headgate and the bridge west of Montrose, it is principally lost by sinking. Whatever seepage arises from irrigation under 2, 3 and 11, drains into the Gunnison or Uncompahgre rivers below the ditches. The available accretions or return waters to the river from irrigation on Spring creek mesa enter along the river between the bridge west of Montrose and the mouth of Spring creek, a distance of 5 or 6 miles. No claim is made that these irrigation rights settled by the adjudication decree were ever abandoned. The evidence shows the owners exhausted every legitimate means within their power to get

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this water down the river, past protestants' headgates for use in their own ditches, and most of them became improverished by the loss of their crops, and expenses of litigation in these attempts. At their request the county officials placed numerous patrolmen on the river, but they were unable to keep the gates above, closed down. In some instances the deputies were thrown into the river, in others they were fired upon, the gates were raised, and the water taken by ditches that were not entitled to it. Finally the state engineer, the division engineer, and the water commissioner of district 41 gave up trying to force this early priority water down to 2 and 3 headgates in times of scarcity, when the decrees had to be enforced. After personally investigating the conditions on the river they saw the impracticability of trying to bring so small a stream over so large a river bed with so great a loss, for the purpose of delivering 18 feet of early priority water at the headgates of 2 and 3. They were convinced that it would be a benefit to every one on the river, and an injury to none, to have this early water transferred into the Montrose canal. They suggested the transfers as a solution of the problem and assisted in finding purchasers, and it was through their influence, assistance, co-operation and direction, that the water rights were sold, and these officials gave evidence on the trial of cogent and convincing character why the transfers should be permitted.

In 1890 and 1891 the owners of No. 3 (the Uncompahgre ditch), whose water had been taken from them by the ditches above, protesting ditches in this case, being unable to obtain their priority river water, constructed what is termed in the evidence, the Feeder ditch. They went over upon the west side of the river, around the point of Ash mesa where seepage had broken out and was flowing into the river below the ditches, or being wasted in bogs and marshes, and constructed this Feeder ditch, and by taking advantage of the elevation, and the side of the mesa, conducted this water up the river, and dropped it into the stream above their headgate. It was

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water which had not reached the river above their headgate, and would not have done so except for their labor in constructing the Feeder ditch, and carrying it up there. The Feeder ditch is flumed across No. 2, which sometimes uses the Feeder water. Also seepage water arising on the lands of the No. 2 owners was permitted to flow into the ditch, and used when they could not get their priority water, late in the season. During flood time, when there was plenty of water in the river, and no occasion for enforcing the decrees, the lands under 2 and 3 were irrigated from the river through 2 and 3 headgates; but during times of scarcity, when the priorities are enforced they have not, since they sold these rights, used 2 and 3 priorities, but have relied on the Feeder ditch and the seepage water coming into No. 2 ditch below its headgate. Priorities 2 and 3, since the transfers, have been taken out into the Montrose canal, and used there, and nowhere else.

The alleged double use of these priorities, occasioned by the change in the point of diversion, is the substance of the matter complained of as injuriously affecting the vested rights of protestants in and to the use of the water of the river; that is, priorities 2 and 3 have been sold and transferred up the river into the Montrose canal, they say, and still are supplied by the accretions, and used at the original points of diversion down the river below protestants' headgates; that to the extent these priorities can be supplied by seepage, at the original point of diversion, they are injuriously affected by depleting the river above their headgates. Whether the Feeder ditch is an independent right, separate from the original decree, developed since the adjudication, or whether it is controlled by the decree, is the principal question involved. The grievance of protestants is that these priorities are being used at the new and old points of diversion at the same time, because the seepage constitutes a part of the decreed priorities. Ditches 2 and 3, since the sale, have made no demand for the priority water, and protestants are not trying to force down this early water to 2 and 3 head-

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gates. They are trying to prevent the purchasers from diverting it into the Montrose canal, so they can use it themselves, upon the theory that 2 and 3 do not need this water, because they are supplied by the accretions below protestants' headgates. The Boles & Manney ditch, a quarter of a mile above No. 2, takes all the water at its headgate, and the seepage into the river between it and No. 2 headgate is very small, fluctuating, and uncertain. The water below protestants' headgates used by 2 and 3 in times of scarcity, since the sale, is that arising either on the property of the land owners under No. 2, or which is supplied by the Feeder ditch. All the accretions into the river above the Boles & Manney ditch that do not sink and disappear, are taken up and used by the protesting ditches, and it is only the use of the seepage between 1½ and 2 and 3, of which they complain.

2. The adjudication decree settled all matters and questions that were necessary to constitute a complete appropriation.—*O'Brien v. King,* 41 Colo. 487, 92 Pac. 945; *P. V. I. Co. v. Central Co.,* 32 Colo. 102, 75 Pac. 391; *Water Co. v. Irrigation Co.,* 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322; *Ditch Co. v. Ditch Co.,* 22 Colo. 115, 43 Pac. 540.

The owners and claimants of the protesting ditches participated in this proceeding, and obtained decrees settling the priorities of their ditches, and are bound by the decree awarding for irrigation use, this early priority water to the Eggleston and Uncompahgre ditches. The decree determined the volume and the date of the priorities, for use during the irrigating season. This right to use in times of scarcity a definite volume of water, in a fixed order of priority, from the natural streams, is one of the most valuable property rights known to the law of this state, which in no way depends on the place of its application, and is not confined to the land upon which the right came into existence; but may be sold separate from the land and changed from one place to another. Only a few of the many cases need be cited to show that we are committed to the doctrine that the point of diver-

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sion, the conduit, the place of application, and character of use, may each and all be changed. *Strickler v. Colorado Springs,* 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245; *City of Telluride v. Davis,* 33 Colo. 355, 80 Pac. 1051, 108 Am. St. Rep. 101; *Wadsworth D. Co. v. Brown,* 39 Colo. 62, 80 Pac. 1060; *Oppenlander v. Left Hand D. Co.,* 18 Colo. 142, 31 Pac. 854; *Irrigating Co. v. Reservoir Co.,* 25 Colo. 144, 53 Pac. 318, 71 Am. St. Rep. 123; *King v. Ackroyd,* 28 Colo. 495, 66 Pac. 906; *Seven Lakes Co. v. Irrigation Co.,* 40 Colo. 382, 93 Pac. 485, 17 L. R. A. (N. S.) 329. The only limitation placed upon the right is the injurious effect that the change may have upon the vested rights of others in and to the use of the water of the stream.

In *Strickler v. Colorado Springs, supra,* the conduit was changed from an irrigating ditch to a city pipe line; the point of diversion was changed from the headgate of the irrigating ditch into the intake of the pipe line; the character of the use was changed from irrigation to general city use; and the place of application was changed from an irrigated farm to the city hydrants. In *Irrigating Co. v. Reservoir Co.,* 25 Colo. 148, 53 Pac. 320, 71 Am. St. 123, where the conclusion reached in the *Strickler* case was attacked as unsound, we say in reference to that case: "Much of the argument might be pertinent were the doctrine of that case an open question, but not only in this state, but in all others in which the system of appropriation prevails, the same result has been reached where the question has been raised. With the conclusion reached in that case we are content." In *City of Telluride v. Davis, supra,* the water right came into existence on a mining placer location, and was afterwards transferred to a ranch and use for irrigation. The owner of the ranch thereafter sold the right to the city of Telluride, which changed the point of diversion into its pipe line, and the nature of the use to city purposes. Here we have three changes in the character of the use, three in the place of application, and at least two in the point of diversion, all in the same water right.

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Petitioners purchased from, and the owners conveyed to them this valuable property right in and to the use of the water, and they became the owners of the priorities that had ripened on the land, and attached to the ditches. The right became their right, and they could transfer it into the Montrose canal upon a compliance with the statute. The statute provides in substance, that every person desiring to change the point of diversion of his right to use water from any of the streams, shall present a petition to the proper court praying that the change be granted, and the court after hearing the evidence shall determine whether the proposed change will injuriously affect the vested rights of others in and to the use of the water, and unless it so appears it shall enter a decree permitting the change as prayed. Sections 3226, 3227, R. S. 1908. So the only question involved in the case is whether the proposed change will injuriously affect the vested rights of others in and to the use of the water of the stream.

3. The injurious effect, if any, upon the vested rights of others, in and to the use of the water of the stream, occasioned by changing the point of diversion will be considered along two lines or branches of the case: First, whether the accretions into the river above the Eggleston and Uncompahgre headgates, and below the Boles & Manney headgate, supply 2 and 3 priorities at the old point of diversion; second, whether the findings of the court, that the changes were a benefit and not an injury to the vested rights of others in and to the use of the water, is sustained by the evidence.

It will be remembered that the headgates of the senior ditches, 2 and 3, from which the changes were made, are located down the river, that the headgate of the junior ditch, the Montrose canal, into which the transfers were made, is located 25 or 30 miles up the river, and that the headgates of protesting ditches, having intervening priorities, are located between the new and old points of diversion. Protestants claim that these senior rights, as long as they are retained at the old points of

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diversion, are or could be supplied by the return waters into the river below protestants' headgates; therefore when used at the old point of diversion, although senior in priority, they do not deplete the river above protestant's headgates who are not required to allow any water to pass their headgates to supply them; but that it depletes the river above protestants' headgates to supply these priorities into the Montrose canal, and to that extent, deprives them of the use of water theretofore enjoyed, and that this constitutes a change in the physical conditions on the river which injuriously affects their vested rights into and to the use of the water.

There is no return water into the river between the Boles & Manney, and 2 and 3 headgates, or if there is, it is very small and insignificant. It is the Feeder ditch, and the seepage water into No. 2 below its headgate, that protestants term the accretions supplying these priorities below their headgates, of which they complain.

The sale, and transfer of these early rights into the Montrose canal, did not preclude the land upon which they ripened and from which they were severed, being irrigated by other water, or with rights other than the ones transferred. It was no surrender of the junior rights of the land owners, or the right to appropriate any unappropriated water, or of developing or procuring water from an independent source, which otherwise would not reach the stream.

It must not be forgotten that No. 3 consumers constructed at their own labor and expense the Feeder ditch by which the seepage water around the rim of Ash mesa, doing no one any good, was conveyed a mile up the river and emptied in the stream just above their headgate. This was an independent appropriation from extraneous sources, which they could make under the seepage act of 1889, section 3177, R. S. 1908, and was not included in, covered or controlled by the general adjudication decree. If by their efforts they lawfully contributed water to the stream which otherwise would not have reached it above their headgate, it was theirs, independent of the original

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adjudication decree, and because by their labor they contributed extraneous water to the normal flow, is no reason why they may not sell their priorities, and irrigate their land with the independent water. The right to protect and preserve their individual ownership in property authorized them, when their priorities were taken from them, and they were threatened with the loss of their ranches and crops, to procure water from any independent source, and because they were put to this additional labor and expense to save themselves, is no reason why they should suffer the further loss of their priorities. The result of such a construction would be disastrous to individual enterprise and activity. Suppose an enterprising ranchman takes stock in a company constructing a mutual reservoir, and finds when it is completed that it supplies him with sufficient water to irrigate his farm. May he not sell his priority, or must he pay a penalty for being public spirited and lose his water rights? Suppose under the seepage statute one drains part of his own lands, and develops water sufficient to irrigate the remainder, may he not sell his water right, and use the developed water, or must he as a penalty for reclaiming his land lose his water right?

In *Strickler v. Colorado Springs, supra,* the court said that if the soil of one's farm should wash away so he had no further use for the water, this was no reason why he should also suffer the loss of his priority of right in and to the use of the water, and that he could sell the water right to be used elsewhere. It has also been held that where one has lost the use of his land from seepage that that is no reason why he should also lose his water right, and that he could change it to other lands himself, or sell it to another, who would have the right to change it to other lands.

In *King v. Ackroyd, supra,* King's land became so seeped that it had no further need of irrigation; but we held that she did not thereby lose her water right, but could sell the water that was used on the seeped land to other parties, to be used on their lands. If the Eggleston,

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and the Feeder ditch had not been built the seepage they collected never could have become a part of the river above 2 and 3 ditches. This water was not an accretion that had entered the river subject to the decree to supply all the priorities in their numerical order, but was independent water procured from an extraneous source, and belonged to the owners who produced it and put it into the river.—*Ripley v. Park,* 40 Colo. 129, 90 Pac. 75, *Platte Valley Co. v. Buckers,* 25 Colo. 77, 53 Pac. 334.

In the *Buckers case, supra,* it is held where a party by his own efforts and expenditures has increased the flow of water in a natural stream, he is entitled to use the water to the extent of the increase. The same principle is again announced in the *Ripley* case, *supra,* where the court, through Mr. Justice Campbell, in speaking of the doctrine announced in the *Buckers* case says: "We have held that such contributions to a natural stream belong to the one who made them."

Protestants may have acquired a vested right in and to the water of the stream, that any seepage into the river below the Boles & Manney headgate should continue to supply priorities 2 and 3 at the old point of diversion; but they did not acquire a vested right in and to the water of the stream, that a subsequently acquired independent water right which augmented the normal flow should become a part of the original decree and supply 2 and 3 priorities. Neither did they acquire a vested right in and to the water of the stream, that the senior priority owners would not subsequently acquire water from some extraneous source, and sell their priorities.

The seepage used by No. 2 was of the same character, except instead of emptying it into the river above its headgate it was turned into the ditch some distance below its headgate. There was no use of putting the water into the river to get it into No. 2 as No. 3 had done, because the Eggleston was on the west side and No. 3 was on the east side of the river.

4. Does the evidence sustain the finding of the court, that the change was a benefit and not an injury to the

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vested rights of others in and to the use of the water of the stream? The evidence on this point is too voluminous to more than state its general effect. The testimony of the water officials who had investigated and studied the conditions on the river for a number of years, was to the effect that in times of scarcity this 18 feet of early priority water could only be delivered to 2 and 3 headgates by sacrificing a great portion of the 40 or 50 feet passing the Montrose canal as well as the accretions into the river below Montrose. In fact, when they attempted to do so by keeping closed all the headgates, it practically consumed the accretions below Montrose. With the water transferred into the Montrose canal this loss by sinking and evaporation is saved to the river. The priority of the Montrose canal is so late, and the chances of getting water in times of scarcity so uncertain, that the business of farming and fruit raising on the mesa was retarded and precarious; but the transfer of this early water into the canal increased the irrigated acreage, and the use of flood waters. Of the water used on the mesa it is estimated from 60 to 70 per cent returned to the river below the dry bar and above the mouth of Spring creek, and was used by the protesting ditches, and none of it was permitted to reach 2 and 3 headgates. In other words the protesting ditches had the use of all the increased accretions into the river, which were greatly augmented by these transfers. As a result, priorities 1½, 4, 5, 6, 7 and 8 are supplied by the return waters largely produced from the effect of the transfers, and No. 9 above the dry bar is supplied by the saving to the river on account of the change in the point of diversion. There is evidence that it would take 60 to 70 feet of river water at the Montrose canal headgate, and consume the accretions below Spring creek, to deliver this 18 feet into 2 and 3 headgates. Whether this statement is true or not, we think the evidence clearly shows that the change in the point of diversion is a benefit to every one. Whatever accretions there may be, if any, into the river between the Boles & Manney and No. 2 headgates are so small

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that they are more than offset by the general benefit.

Crippen v. Glasgow, 38 Colo. 105, 87 Pac. 1073, was a proceeding to change the point of diversion of 4 feet of priority water to a point further up the stream. The lower court found it would require a flow of 14 feet in the bed of the river to deliver 4 feet down the stream into the headgate at the original point of diversion, while it would only require 4 feet from the river to deliver the 4 feet up the stream into the canal at the new point of diversion; that this saving to the river of 11 feet, together with the additional accretions from seepage, caused by applying the transferred water to the lands under the ditch, at the new point of diversion, was beneficial, and more than compensated any loss to the land owners between the two points of diversion. For this reason it held that any vested right of intervening appropriators in and to the use of water between the new and old points of diversion would not be injuriously affected on account of the change, and the finding was sustained by this court.

The protestants say they have no intention of causing this waste by forcing these early priorities down to 2 and 3; they do not want the water to go there; they want it themselves. Viewed from this aspect of the case, why should protestants, who do not own the water, be given it in preference, to prevent waste, to those who own it, and have transferred it into the Montrose canal, which prevents the waste. If preferences are to be shown or given to anyone to prevent waste, it would seem the use, if it is practicable, should be given to the owner.

We are of the opinion that the finding of the court is right and is sustained by the evidence.

Affirmed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

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[No. 5891.]

MOORE ET ALS. v. IRONSTONE DITCH COMPANY ET AL.

1. WATER RIGHTS—*Change of Point of Diversion*—The case ruled by the opinion in *Ironstone Ditch Company v. Ashenfelter, ante.* (47)

2. APPEALS—*Judgment*—Petition for leave to change the point of diversion of certain waters, denied by the district court. Decree reversed, with directions to determine the respective rights of the several petitioners, upon the evidence already heard, with the additional evidence which may be produced by any party, and to enter a decree permitting the change. (48)

Appeal from Montrose District Court.—Hon. THERON STEVENS, Judge.

Mr. M. FAIRLAMB, Mr. F. W. HEATH, MESSRS. BELL, CATLIN, & BLAKE, for appellants.

Mr. S. S. SHERMAN, Mr. MILTON R. WELCH, Mr. R. M. LOGAN, for appellees.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

For a statement of the facts, see *Ironstone Ditch Co. v. Ashenfelter,* No. 6438, *ante,* decided at this term.

This case is identical with *Ironstone Ditch Co. v. Ashenfelter,* No. 6438. It was tried upon practically the same evidence, but before another district judge, who found exactly opposite to the determination in No. 6438, and refused to permit the change in the point of diversion of the same priority water from the same ditches into the same canal. It is manifest the court in this case misapprehended or misconceived the law. It found the Feeder ditch, and the seepage water collected by No. 2, below its headgate, were accretions belonging to the river,

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and were controlled by the decree, and not independent water rights belonging to the persons who owned and were using them. It also overruled the finding of the referee determining the right and interest of each petitioner in and to the priority water which he sought to transfer, and refused to partition the water decreed these ditches, or to make any finding of the respective rights of the petitioners therein. This was error.—*Hallet v. Carpenter,* 37 Colo. 30, 86 Pac. 317.

For the reasons given in *Ironstone Ditch Co. v. Ashenfelter, supra,* the case will be reversed and remanded, with directions to the lower court to determine the respective rights, if any, of each petitioner in and to the water sought to be transferred, which may be done upon the evidence already taken, together with such additional evidence as the parties may see fit to introduce, and to then enter a decree permitting the change in the point of diversion as prayed, in compliance with the law as announced in the opinion in No. 6438, *supra.*

Reversed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

[No. 7104.]

ERBAUGH v. THE PEOPLE.

1. CRIMINAL LAW—*Practice—Petition for Change of Venue—Prejudice of the People—Discretion*—Prejudice of the inhabitants of the county alleged as the ground of an application to change the venue (Rev. Stat., § 6965), presents a question of fact triable by the court, the result resting in discretion. The decision will not be disturbed unless an abuse of discretion appears. (51)

2. ——*Prejudice of the Judge*—Where, in a criminal prosecution, application is made to change the venue on the ground of prejudice in the mind of the presiding judge (Rev. stat., § 6963), such judge may

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hear and determine all questions as to the sufficiency of the petition, and the affidavits in support of it; but the question whether in fact such prejudice exists is never tried. If a sufficient showing is made the accused is entitled to the change, as of right, and the court has no further jurisdiction, save to allow the change.

To deny prejudice and overrule the application upon this ground is error. (52)

3. ——*Time of Application—Notice—Waiver*—The petition for a change of venue was not filed until the morning of the day appointed for the trial, several months after the information was filed, and the district attorney was not served with any prior notice thereof. Nevertheless he appeared and contested the application, raising no question as to its sufficiency. The record showing nothing to the contrary it was presumed that all objections as to these matters were waived. (52, 53)

Error to Denver District Court.—Hon. GREELEY W. WHITFORD, Judge.

Mr. CHAS. R. BOSWORTH, Mr. THOS. E. MCINTYRE, Mr. WILLIAM E. FOLY, and Mr. CHARLES O. ERBAUGH, *pro se*, for plaintiff in error.

Hon. JOHN T. BARNETT, Attorney General, Mr. JAMES Y. ROGERS, Assistant Attorney General, Hon. BENJAMIN GRIFFITH, Attorney General, Mr. PHILIP W. MOTHERSILL, Assistant Attorney General, Hon. FRED FARRAR, Attorney General, and Mr. FRANK C. WEST, Assistant Attorney General, for The People.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

November 29, 1909, defendant was placed on trial for forgery, under an information filed June 4, 1909, convicted and sentenced to the penitentiary. He brings the case here on error.

The first count charges him with making, and the second count with uttering the following check:

"Denver, Colo., May 3rd, 1909.

Colorado National Bank.

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Pay to the Order of C. O. Erbaugh.....$3.60
Three and 60/00 Dollars.

(Signed) A. J. Brower.
(Endorsed) C. O. Erbaugh, 1275 Josephine."

A third count charging him with making and passing a fictitious check was withdrawn from the jury.

The statute provides in substance: Every person who shall forge any check for the payment of money with intent to damage or defraud any person, or who shall utter, as true and genuine, any forged check, knowing the same to be forged, with intent to prejudice, damage or defraud any person, or shall pass, with intent to defraud any person, any fictitious check purporting to be the check of any individual for the payment of money when in fact there is no such individual, knowing the check to be fictitious, shall be deemed guilty of the crime of forgery. Sections 1704, 1711, R. S. 1908.

2. Defendant filed a petition, verified by his affidavit, asking for a change of venue upon the ground that he feared and believed he could not obtain a fair and impartial trial before the presiding judge, on account of prejudice against him entertained by such judge; because, he says in May, 1905, the judge, then acting in the capacity of deputy district attorney, prosecuted him upon the charge of embezzlement, in which, while addressing the jury in that case, he expressed his belief in defendant's guilt, and said that he (defendant) deserved to receive the severest punishment, and that the same belief is still entertained by him as presiding judge, for which reason he fears he cannot have a fair and impartial trial before him. Three separate affidavits were filed in support of the petition in which each affiant states, among other things, that "he has read the petition for change of venue, in support of which this affidavit is made, and knows the contents thereof, and that he believes the matters and things therein stated to be true, and that the said defendant could not have a fair and impartial trial before said court."

The petition also asked for a change of venue from

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the county on account of the prejudice of the inhabitants thereof, but this will not be further considered because that was a question of fact triable to the court, and resting clearly within its discretion, will not be disturbed unless abused.—*Power v. People,* 17 Colo. 178, 28 Pac. 1121; *Michael v. Mills,* 22 Colo. 439, 45 Pac. 429; *Doll v. Stewart,* 30 Colo. 320, 70 Pac. 326; *Andrews v. People,* 33 Colo. 193, 79 Pac. 1031, 108 Am. St. Rep. 76; *Kerr v. Burns,* 42 Colo. 285, 93 Pac. 1120.

3. The chapter allowing and regulating changes of venue in criminal cases provides: "Section 1. In any criminal cause pending in any court of record of competent jurisdiction, the judge of said court shall be deemed incompetent to hear or try said cause in either of the following cases: * * * Third. When the judge is in any wise interested or prejudiced. * * * Such prejudice of the judge must be shown by the affidavit of at least two credible persons not related to the defendant." R. S. 1908, § 6963.

The statute further provides in substance, in case the judge shall be incompetent to sit for any of the causes mentioned, he may change the venue to some other court of competent jurisdiction in the same county, or in some other county, or he may set the case down for trial, and request the judge of some other court of competent jurisdiction to try it.

The application must be made at the earliest possible moment after the cause for the change becomes known to the defendant. Under the statute he is entitled to but one change.

4. Two questions arise in considering a petition and affidavits for a change of venue in a criminal case based upon the ground of the prejudice of the presiding judge: questions of law and questions of fact. The first go to the sufficiency of the complaint against the judge and affidavits in support thereof in form and substance. *Young v. People,* 54 Colo. 293. The second is a question of whether the judge is in fact prejudiced against the defendant. The first, under the prior decisions of this

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court, he has jurisdiction to hear and determine; but the second, the question of fact, is not tried. It seems the legislature purposely omitted counter-affidavits or evidence of any kind as to the prejudice of the judge, to relieve him or anyone else from trying the question. If the application is properly made and supported, as the statute requires, the question of the judge's prejudice will not be considered. The petition and affidavits are conditions imposed by statute, upon a compliance with which, if they are legally sufficient, the defendant is entitled to a change. In such a case the judge loses jurisdiction except to grant the change, without any inquiry into the facts. The petition and affidavit must be proper and sufficient and the facts must be shown disclosing the prejudice of the judge. While he may pass upon the question of law involving the sufficiency of these matters, the question of the truth of the allegation is never tried. In this state, when a defendant brings himself properly within the provisions of the statute, the judge loses jurisdiction, except to grant the change, the statute relative to which, is mandatory and imperative.—*Bernhamer v. State,* 123 Ind. 577, 24 N. E. 509; *Duggins v. State,* 66 Ind. 350; *Manly v. State,* 52 Ind. 215; *Mershon v. State,* 44 Ind. 598; *Smith v. State,* 1 Kan. 365; *Ex parte Justus,* 3 Okl. Cr. 111, 104 Pac. 933, 25 L. R. A. (N. S.) 483; *State v. Witherspoon,* 231 Mo. 706, 133 S. W. 323; *State v. Spivey,* 191 Mo. 87, 90 S. W. 81; *State v. Sanders,* 106 Mo. 188, 17 S. W. 223; *State v. Shipman,* 93 Mo. 147, 6 S. W. 97; *State v. Henning,* 3 S. D. 492, 54 N. W. 536; *State v. Palmer,* 4 S. D. 543, 57 N. W. 490; *State v. Kent,* 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686; *Cantwell v. People,* 138 Ill. 602, 28 N. E. 964; *People v. Knight,* 155 Ill. App. 92.

5. The petition for a change of venue was not filed until the morning of the trial about six months after the information was filed, and the district attorney was not served with notice; the record, however, shows that he appeared and participated in the argument of the petition. It will therefore be presumed, in the absence of the

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record showing the contrary, that he waived these matters. *State v. Spivey, supra,* 104. No question was considered, or even raised or suggested in the lower court that the affidavits were not sufficient. They were treated as sufficient in form and substance, no objection was made upon this ground and the record shows the judge decided that the petition, on the ground of his prejudice, was not true in fact and for this reason alone overruled the motion. This was error.

Reversed and Remanded.

Decision *en banc.*

Mr. JUSTICE GABBERT and Mr. JUSTICE BAILEY dissent.

[No. 7436.]

ANDERSON v. WOODWARD.

1. COUNTY COURT—*Jurisdiction*—Application by plaintiff in the local land office of the United States to enter land as desert lands. Application denied, and defendant permitted to enter the lands as a homestead. On appeal to the general land office this decision was vacated, and a hearing as to the right of the applicant directed. Pending this appeal the local land office permitted the defendant to make final proof, and delivered to him a patent. *Held,* that the county court had jurisdiction of a bill to cancel the patent. (55)

2. LAND DEPARTMENT—*Unauthorized Action of Officials*—The action of the officers of the land department of the United States, beyond the scope of their authority, is void. A patent for lands which had been previously granted, reserved from sale, or appropriated may be annulled by the courts; otherwise the injured party would be without redress. (55)

Appeal from Morgan County Court.—Hon. M. M. HOUSE, Judge.

Messrs. MCCONLEY & HINCKLEY, for appellant.

Messrs. TAYLOR & PENDELL, for appellee.

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Anderson brought suit in the county court against Woodward, the object of which was to cancel a patent to a designated tract of land. In his complaint plaintiff alleged that the subject matter in controversy did not exceed in value the sum of two thousand dollars; that he had applied to the local land office at Sterling to enter the land embraced in the patent, as a desert entry; that his application was made as provided by the rules and regulations of the government relative to desert entries; that the officers of the local land office rejected his application, and permitted the defendant to make a homestead entry of the land; that thereafter he appealed from this decision, both to the commissioner of the general land office, and the secretary of the interior; that the latter annulled, cancelled, and held for naught the rejection by the local land office of his application for desert entry, and also held for naught the homestead application of defendant, and ordered that defendant be required to show why his entry should not be cancelled, and the application of plaintiff to make desert entry should not be allowed; that this order is in full force and effect; that the hearing so ordered has not been had. He further alleged that pending his appeal the local land office permitted defendant to make pretended final proof, by commutation, upon the land involved, and delivered to defendant a patent therefor, without notice to plaintiff, the officials and defendant well knowing that plaintiff's appeal was pending, and that his rights were then being adjudicated in the general land office, and before the interior department. He also alleged that his application for desert entry was made when the tract involved was vacant government land, and subject to desert entry and prior to the time when defendant was permitted to contest his application.

The defendant demurred upon the ground that the court did not have jurisdiction over the subject matter of controversy, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff having elected to stand by

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his complaint, his action was dismissed. Plaintiff brings the cause here for review by appeal.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The court had jurisdiction of the cause, and the only question involved relates to the sufficiency of the complaint to state a cause of action. The facts are undisputed, and the proposition is whether on these facts the land department was authorized by law to issue a patent to the defendant.

It has frequently been decided by the supreme court of the United States that patents for lands which have been previously granted, reserved from sale, or appropriated, are void, and that actions may be maintained to annul such patents.—*Morton v. Nebraska,* 21 Wall. 660, 22 L. Ed. 639; *Burfenning v. Chicago, St. P. M. & O. R. Co.,* 163 U. S. 319, 41 L. Ed. 175, 16 Sup. Ct. R. 1018.

These decisions are based upon the ground that the action of the officials of the land department beyond the scope of their authority is void. We think this declaration of the law is applicable here. The local land office had rendered judgment from which plaintiff appealed to the commissioner of the general land office and the secretary of the interior. Pending the disposition of this appeal, which was subsequently decided in favor of plaintiff, the local land office entertained the application of defendant for patent and granted him title. This was beyond their authority for the reason that pending the disposition of the appeal the judgment of the local officials stood suspended, and they were without authority to entertain the application of either party for title.

This being the situation and plaintiff being a claimant of the premises, may maintain an action to annul the patent procured by the defendant, otherwise the action of the land department, which was without authority, deprives plaintiff of all remedy. The secretary of the interior ordered a rehearing before the local land office.

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Before this order defendant secured title, which cannot be annuled by the land department, for after issuance of patent its authority and control over the title has passed. —*Moore v. Robbins,* 96 U. S. 530.

Consequently his only redress is in the courts to have the patent cancelled, which if ordered will place the parties in the position to have their rights to the land in controversy determined by the land department in accordance with the order of the secretary of the interior.

The judgment of the county court is reversed and the cause remanded with directions to overrule the demurrer, and for further proceedings according to law.

Judgment reversed and cause remanded.

CHIEF JUSTICE MUSSER and MR. JUSTICE WHITE concur.

[No. 7657.]

NATIONAL SURETY COMPANY v. SCHAFER ET AL.

1. STATUTES—*Construction*—A statute is to be interpreted by a consideration of the whole and every part thereof. The occasion and necessity of the enactment, and the mischief to be remedied, are to be borne in mind; it is to be presumed that the legislature intended what is reasonable and just, and not what is absurd and oppressive. And it is to be remembered that what is apparently within the letter of the act, is not within the statute unless evidently intended. (60)

2. APPEAL BOND—*Appeal Dismissed—Liability of Surety*—The power of the supreme court to suspend execution of a judgment by awarding a supersedeas is not limited by the provisions of the code, § 422. (64)

An appeal from a judgment of the district court had been dismissed. More than thirty days thereafter, on error brought to the same judgment, this court awarded a supersedeas, and the bond required by the statute was given. Later, on application of the creditor, the district court, acting under § 422 of the code, entered judgment on the appeal bond, against the surety therein, for the full amount of the judgment

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and interest. Considering the absurdity and injustice of a construction of the code provision which would impose absolute liability upon the surety, when this court might, in the exercise of its unquestioned jurisdiction, vacate the judgment which was the sole ground of the creditor's right, and the surety's liability, *held*, that the judgment of the district court upon the appeal bond was error. (62, 63)

Error to Lincoln District Court.—Hon. J. W. SHEAFOR, Judge.

Messrs. O'DONNELL, GRAHAM & O'DONNELL, for plaintiff in error.

Mr. HENRY TROWBRIDGE, for defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The defendants in error, on the 21st day of February, 1911, obtained a judgment in the district court of Lincoln county, against the Denver Horse Importing Company, in the sum of $4,400, and for costs of suit. From this judgment an appeal was prayed and allowed to this court. The appeal bond required by order of the district court was filed in that court on the 27th day of February, 1911, with the plaintiff in error, the National Surety Company, as surety. June 3, 1911, upon a short transcript, the appeal was dismissed, and the remittitur issued. On the 8th day of August, 1911, the record was entered here as upon error, and a supersedeas allowed. After this, and after the remittitur had been lodged in the district court, and on the 14th day of October, 1911, upon motion of the defendants in error here, the district court rendered judgment upon the appeal bond in the sum of $4,780.75, being the amount of the said judgment theretofore rendered, together with interest and costs. The plaintiff in error was duly notified of such motion, and was present by counsel in court, and objected to the rendition of such judgment. The objection urged was that under the state of facts presented, the court was

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without jurisdiction to enter the judgment at that time. Section 397 of the civil code provides:

"The dismissal of an appeal may, by order of the court, be made without prejudice to another appeal or writ of error; but unless another appeal or supersedeas be taken or allowed within thirty days after such dismissal, the dismissal of an appeal or writ of error shall operate as an affirmance of the judgment of the trial court, so as to make the sureties upon the undertaking given by the appellant or plaintiff in error, liable on such undertaking."

By the act of 1907, section 422 of the civil code was amended so as to include the following provision:

"If the appeal be from a judgment or decree directing the payment of money, the appeal bond shall also provide that if the appellant does not make payment of said judgment or decree and the interest and costs within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, on motion of the obligee in said bond, judgment shall be entered in the court from which the appeal is taken, in his favor, against the sureties for such amount as may be awarded against the appellant on appeal. No execution shall issue on such judgment against the sureties, however, until a writ of *scire facias* shall issue and be served on such sureties, in the manner in which summons may be served, requiring them to show cause before the court, by a day to be therein named, no less than five days after the service of said writ, why execution should not be issued against them, and no appeal by said sureties from the judgment of the court thereon shall lie."

Section 401 of the civil code provides that a writ of error shall not be brought after the expiration of three years from the rendition of the judgment complained of. Section 402 provides that no writ of error shall operate as a supersedeas except upon order of the court or judge, the writ be made a supersedeas, nor until a bond be filed as in case of appeals. These sections of the statute were in effect at the time, and are controlling in this case. The

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contention of the plaintiff in error is, in substance, that section 397, when construed in connection with other sections of the code related thereto, must be construed as intending, that when an appeal has been dismissed, and a new obligation for the judgment entered into upon order granting a supersedeas within thirty days after the dismissal, the surety upon the new bond thus given shall be liable; but that if more than thirty days elapses, as in this case, between the time of dismissal and that of giving the supersedeas bond, then the appeal bond shall remain effective, and in such event the holder of the judgment can, if the judgment be finally affirmed, have recourse upon either or both sets of sureties, being restricted to one satisfaction of the judgment. That is to say, that while the defendant in error is liable upon its appeal bond, such liability does not mature until the judgment is affirmed, admitting, however, that if the writ of error had not been made a supersedeas, the liability upon the appeal bond would immediately accrue.

On the other hand, as we understand it, the defendants in error contend that inasmuch as the supersedeas was not allowed until more than thirty days had elapsed from the date of dismissal, the dismissal acted as an affirmance of the judgment, and that they are entitled to immediate judgment on the bond, and to execution thereon, regardless of the fate of the judgment in this court. This was the view of the district court. The question here presented has not been determined by this court. All cases involving the rights of judgment creditors under section 397 of the code of civil procedure, in so far as hitherto determined, have involved an appeal bond wherein the appeal had for some reason been dismissed, and wherein this court has not again assumed jurisdiction by a new appeal, or by writ of error, either within or after thirty days from the date of dismissal. In the case at bar, after the appeal had been dismissed, this court had again assumed jurisdiction by the issuance of its writ of error, and had superseded the judgment for which the appeal bond had been given, though not within

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the thirty days provided by the statute. It must be conceded that the statutes allowing writs of error to be brought within three years from the date of judgment; the causing of such writs to act as supersedeas; together with the power given to this court to re-enter dismissed appeal cases as on error, are all effective in this particular case, and must be construed together and in connection with the other statutes under consideration. The power of the court to suspend the execution of the original judgment, by granting the supersedeas in this case, cannot be questioned, and that case is before us for review and final determination as in any other case on error wherein the judgment has been superseded. It cannot be said that this power and authority was intended to be limited by the provisions of section 397 of the civil code. Then the judgment, to satisfy which the appeal bond involved in this action was given, is suspended by this court pending review and determination, and as effectively so, as if the former appeal had never been taken. It is a rule of statutory construction, approved by the appellate courts of this state, that where there is ground for dispute as to the intent of the legislature, and meaning of the statutes, we should consider the results of any such construction, and it is always presumed that the legislature, in the enactment of a statute, seeks to obtain reasonable results and practical objects. Further, that it is always true that a thing apparently within the letter of the act is not within the statute unless it be likewise within the evident intention of the legislature. That an intention must always be deduced from a construction of the whole and every part of the statute. The occasion and necessity of the law and the mischief to be remedied and the object in view are always to be taken into account in determining the intention. It cannot be assumed that the legislature intended to impose farcical proceedings upon this court, or upon litigants, particularly where these may result in great injustice; for this might well be the result in this case. The legislature has conferred the unequivocal right upon the Horse Importing Company to

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have the judgment against it reviewed and determined by this court; and before the present judgment upon the appeal bond was rendered, that company had in a lawful way elected to exercise that right, and the court had assumed the burden imposed by the statute to determine the rights of the parties. The whole matter was, therefore, at the time, pending in this court, with the rights of the judgment creditors duly safeguarded by the supersedeas bond as provided by the statute. Then, if this court shall find its duty to be, to reverse and vacate the judgment which the appeal bond was given to protect, the appeal bond and the supersedeas bond by their very terms have served their purpose, and there can be no longer a liability thereunder. In such a case, can it be said that the legislature intended that the surety should pay the judgment, regardless of its fate in this court? Such would be the limit in absurdity. It is well to consider the relation of an appeal or a supersedeas bond to the judgment suspended by either, or, as in this case, both of them. In the case of *Rockwell v. District Court,* 17 Colo. 118, 29 Pac. 454, 31 Am. St. 265, it was said:

"An appeal is in no sense a substitute for the judgment appealed from. It operates to suspend the enforcement of the judgment for a limited time; but it does not take the place of, nor nullify the judgment. On the contrary, notwithstanding the appeal bond, the judgment may be affirmed and thus all barriers to its enforcement may be removed. In that case does the appeal bond become void and without force and effect? Clearly not; it then becomes for the first time an available security for the payment of the judgment. While the enforcement of the judgment is suspended by the appeal, the bond is but a contingent security, and appellee can have no remedy upon it. It is only when the original judgment becomes enforceable by affirmance, or by the failure of the appeal, that appellee can resort to his action upon the bond. Thus, it is apparent that the appeal bond is not a substitute for the original judgment. Its vitality depends upon the sur-

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vival of the judgment. Its fate is inseparably linked with the judgment. If the judgment be reversed, the obligation of the appeal bond becomes void; if the judgment be affirmed, the obligation remains in full force and effect. Such, in substance, is the language,—such is the legal tenor and effect of the bond."

Surely, the judgment creditors, by reason of the supersedeas and action pending in this court, could not have enforced the execution of the former judgment at the time the court allowed the judgment on the appeal bond. It would be a singular state of the law, and contrary to every sense of reason and justice, that judgment and execution on the appeal bond might be allowed at a time when the judgment itself was superseded, for, as this court has declared in *Rockwell v. District Court, supra,* while the enforcement of the judgment is suspended by the appeal, the bond is but a contingent security, and appellees can have no remedy upon it. The defendants in error claim, and can claim, only under section 397 of the civil code. This section clearly creates nothing greater than a liability, the enforcement of which must be by action at law, as in case of other liability. This section does not authorize the judgment and execution against the sureties on the bond in the main case, as in case of final determination by this court. The language of this section is that the dismissal of an appeal or writ of error, shall operate as an affirmance of the judgment, so as to make the sureties upon the undertaking given by the appellant or plaintiff in error liable on such undertaking,—not to authorize the lower court to render judgment and issue execution upon motion as was done here. The section is clearly intended to permit the dismissal of the appeal without prejudice, and to fix the liability of the sureties in certain cases, and at a particular time, and there can be no serious question but that the plaintiff in error is liable upon the bond upon which the judgment in this case was ordered; but such liability is a contingent one, and may become effective only in case of the affirmance by this court of the judg-

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ment pending, or where the dismissal is equivalent to a final disposition of the case. The defendants in error have cited, to sustain their contention, the following cases: *McMichael v. Groves,* 14 Colo. 540, 23 Pac. 1006; *Long v. Sullivan,* 21 Colo. 109, 40 Pac. 359; *Mueller v. Kelly,* 8 Colo. App. 527, 47 Pac. 72; *Wilson v. Welch,* 8 Colo. App. 210, 46 Pac. 106; *Callbreath v. Coyne,* 48 Colo. 199, 109 Pac. 428; *Shannon v. Dodge,* 18 Colo. 164, 32 Pac. 61; *Rockwell v. District Court,* 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265. We have carefully considered all these cases, but find nothing in conflict with the conclusion we have reached in this case. The tenor of them may be epitomized in the statement in the opinion of Mr. Justice Elliot in *Rockwell v. District Court, supra*:

"In case of a breach of the condition of the bond, the statute authorizes the obligee to *maintain an action* thereon—not merely to bring an action, but to maintain it,—that is, to recover judgment upon it."

In other words, these cases simply confirm the statute in fixing the liability of the surety, if a new appeal or writ of error is not prosecuted within thirty days after the dismissal of the first appeal.

Clearly, it was not intended by this court to say that the liability should be enforced while the judgment itself was suspended by this court, pending a review and determination, for to so conclude would be to deny the aggrieved party the right to pursue his remedy allowed by the statute, and to deny to this court the power to re-enter on error appealed cases, which right carries with it the duty to fully consider and determine the same. To impose such a burden on sureties to an appeal bond is clearly such an injustice as was never contemplated by the statute. It is true that in the case of *McMichael v. Groves, supra,* there is language used in the opinion which would seem to indicate the contrary of the view herein expressed, but the question we are considering was not involved in that case, and such language must, therefore, be regarded as mere *obiter dictum.* That case was one where the appeal was dismissed, but without an order that

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the same should be without prejudice. The question was upon a motion to dismiss a writ of error, allowed after the expiration of thirty days after the dismissal of the appealed case, and the court held that the writ should be dismissed, but for the sole reason that the appeal, having been dismissed without the saving clause, was a final disposition of the case. This was the only question before the court. It was, however, in that case distinctly held, that if the appeal had been dismissed without prejudice, the writ of error might be allowed at any time within three years from the rendition of the judgment.

We are of the opinion that the procedure under section 422, Rev. Stats. 1908, is not applicable, and was not intended to apply in the case of an appeal bond, in which the appeal has been dismissed without prejudice, but only in a case where the judgment has been expressly affirmed by the appellate court, or where the action of the court is in effect a final affirmance of the judgment, as in the case of *Rockwell v. District Court, supra,* where the order of dismissal was not without prejudice, and by reason of which, a writ of error could not thereafter lie.

This is made manifest by the last clause of said section, wherein an appeal from such judgment by the sureties is prohibited.

The right of the appellate court, under section 397 of the civil code, to dismiss an appeal without prejudice is permissive and not mandatory, and the power of this court, in its discretion, to decline to enter such an order is as absolute as before the enactment of the statute. Prior to the enactment of this section of the civil code, the dismissal of a writ of error or an appeal, without express affirmance of the judgment, operated absolutely, regardless of the ground relied on, as a nonsuit in the former instance, and as a discontinuance of the particular appellate proceeding in the latter. *McMichael v. Groves,* 14 Colo. 540, 23 Pac. 1006; *Freas v. Englebrecht,* 3 Colo. 377; *Monti v. Bishop, id.* 605. But by said section 397, the appellate court was empowered, by order duly entered, to permit another appeal or writ of error, either

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of which, when duly perfected, must be held to stay execution of the judgment as effectually as in case of the original appeal.

The views herein expressed would seem to reasonably protect all parties in interest, and to give to each of the sections of the statute considered, an effective and harmonious purpose. We must not be understood as holding that if at the time of the issuance of an execution to enforce a judgment upon an appeal bond, where the judgment appealed from has not been suspended by order of this court, that judgment may not be rendered or that execution may not issue; but rather, that in a case where the judgment has been suspended by the appellate court, execution must not go against the sureties on the appeal bond until the judgment has become final, by action of this court; and when such action is had, then the judgment creditor may rely on either the appeal bond or the supersedeas bond, or both, but limited to the extent of the judgment.

The judgment is reversed.

MUSSER, C. J., and GABBERT, J., concur.

[No. 7753.]

STRAUSS v. BRIER.

1. CONTRACT—*Construed*—A contract providing for the sale by one party to the other, of a patent right upon the payment of certain specified sums, at specified dates in the future, subscribed by the seller only, and containing no promise of payment by the purchaser, is a mere option, and imposes no liability upon the latter. Even though he has accepted and acted upon it, and paid a portion of the stipulated purchase money no action lies for the residue. (70, 72)

2. PATENT RIGHT—*Assignment—Validity*—Under § 4898 of the Revised Statutes of the United States no assignment of a patent for an invention, or of an interest therein, can be said to be valid, unless

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recorded in the patent office within three months from the date thereof.

Plaintiff in his complaint demanded certain moneys as stipulated to be paid for an interest in a patent for an invention. He claimed by assignment from the inventor and patentee, but was not able to produce any assignment. No assignment to him had ever been recorded, and though he had covenanted to deliver to defendant, free of encumbrance "all right" to the patent, within the state of Colorado, he was in no position to comply with his covenant. *Held*, he was not entitled to recover any share of the stipulated purchase price. (70, 72)

Error to Denver District Court.—Hon. GREELEY W. WHITFORD, Judge.

Mr. B. C. HILLIARD, Mr. J. R. ALLPHIN, for plaintiff in error.

Miss GAIL LAUGHLIN, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The complaint in this case alleged as a first cause of action, a balance due on a written agreement for the sale of an interest in a patent right, covering the territory of the state of Colorado. It seems necessary, to a proper understanding of this matter, that this agreement should be set out in full, and it is as follows:

"Witnesseth, That for and in consideration of the sum of ten ($10.00) dollars paid to the party of the first part by the party of the second part, the receipt of which is hereby acknowledged, and for the payment of one thousand nine hundred and ninety ($1,990.00) dollars, to be paid to the party of the first part as follows: Nine hundred and ninety ($990.00) dollars on or before three months from the date of this contract and the balance of one thousand ($1.000.00) dollars on or before six (6) months from the date of this contract, the party of the first part hereby agrees to deliver to the party of the second part, free and clear of all encumbrance, whatsoever, all of the right, title and interest in and to the state of Colorado, for the use of the Day's resilient tire filler,

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and does hereby grant and convey to the party of the second part his rights, privileges and benefits which he, the party of the first part, now holds, and the party of the first part hereby guarantees and warrants unto the party of the second part that he will defend the party of the second part in his rights to the state in every way against all persons legally claiming, or to claim, the same, and the said party of the first part hereby agrees to deliver over to the said party of the second part all the rights, benefits, titles and grants and conveyances in and to the said state for the use and control of the said party of the second part, the Day's resilient tire filler upon the final payment of the amount stated in this contract, on or before the time specified. That time shall be the essence of this contract, and in case the party of the second part fails to make payment as above stated, then this contract shall be null and void..

"This contract is made in duplicate, each party holding a copy of the same. Party of the first part certifies that he has full right to sell the above, and this contract shall be binding upon the heirs, executors, administrators, assigns and successors of and to the parties hereto."

The complaint further claims, under a second and third causes of action, respectively, the amount of $45 for merchandise and $36 for rent. A demurrer to the first cause was overruled, and the defendant answered, denying generally the allegations of the complaint, except the execution of the contract, and the payments made thereunder, and denying that the allegations in the first cause of action were sufficient in law to constitute a cause of action against defendant. The answer further alleges that the written agreement had been modified on the 26th day of November, 1910, by a reduction in the amount to be paid thereunder, and at a time prior to the maturity of the alleged obligation under the written agreement, and which will hereinafter be more particularly referred to.

The court found for the plaintiff, and rendered judgment in the sum of $705.50. This included the sum of $27 found to be due for merchandise and the sum of $36 for rent, under the second and third causes of action.

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It appears that on the 26th day of November, 1910, there had been paid by the defendant below, on the written agreement, the sum of $1,000, leaving a balance unpaid in the sum of $1,000, which under the agreement, was payable on the 6th day of January, 1911, following. On the former date, Brier, the plaintiff, being pressed for money for immediate use, proposed that if Strauss, the defendant, would pay him $600 in cash, and pay a certain account which Brier owed to the firm of Strauss, then estimated to be about $100, he would settle the matter in full. It was finally agreed between them that Strauss should pay $300 in cash, which he then did, and should pay the remaining $300 later, and that he should, in addition, settle the Brier account with the firm of Strauss. Brier contends that the additional $300 was to be paid the following week; while Strauss, corroborated by other witnesses, says he was to pay the additional $300 just as soon as he possibly could, which he was to try to do by the 25th of December following. It further appears that Strauss went to California some time after this, and returned on the 3rd day of February, 1911, and on that day paid Brier an additional $100. This was credited to Brier on the written contract, but it was clearly intended by Strauss to be paid on the later agreement. Later on, and before this suit was instituted, Strauss tendered to Brier $200, together with a satisfaction of the Brier account with the Strauss firm, as full satisfaction of their differences, and repeated the tender on the 18th day of February, before the suit was instituted, and which was both times refused.

The contention of counsel for Brier is that, Strauss having failed to pay the additional $300 within the time he says it was agreed to be paid, such agreement is now void, and the written agreement is in full force and effect, and that therefore Brier is entitled to recover the amount named in the latter. However, under the view we take of the written agreement, and of the later agreement, Brier is not entitled to recovered upon either; therefore it is not necessary to consider the matter of the later

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agreement. Nothing is plainer than that the parties entered into an agreement in this respect, and that one of the considerations therefor was an immediate cash payment, at a time when no payments were due. That Strauss acted in entire good faith in his efforts to comply with the terms of the later agreement, as he and his witnesses testify, is clear.

It is likewise plain that this action is brought in a spirit of bad faith, is sought to be sustained upon technicality, and, if it may be sustained at all, must rest upon the testimony of plaintiff, overwhelmingly outweighed by that of other witnesses. Defendant denies the right of the plaintiff below, to recover under the first cause of action, that is to say, under the written contract, either in its original form or as amended by the change in the time and amounts by the subsequent agreement. This question was raised in the court below by a motion for judgment on the pleadings as to such cause of action, and also by a motion for nonsuit.

It appears that the thing agreed to sold under the contract, and referred to therein as "Day's resilient tire filler," was an alleged right, under United States patent, for some sort of process to be used in connection with auto tires. The plaintiff, Brier, testified that at the time of the agreement, one Day, who lived in the state of Texas, had applied to the government for a patent on this process; that at the time of the agreement here involved he had some sort of a written contract with Day, to the effect that in case Day should be granted a patent he would sell to Brier the rights thereunder, for the state of Colorado, with immediate permission to Brier to use the process, which he was then using, within this state. He further testified that he had not delivered or assigned this agreement to defendant Strauss; also that he had lost it about a year before the trial; did not know where it was; had not requested either a new agreement or a copy of the original from Day. Further, that Day had written him to the effect that a patent had been granted, but he had not made to Brier an assignment of any rights

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under any such patent, and that he (Brier) had no *personal* knowledge of the issuance of a patent. It is clear from Brier's testimony that, neither at the time of the agreement sued on, nor at any time since, has he ever had an assignment of any such patent, and that the letter from Day was his only information that a patent had been granted. Hence, at no time has he ever been in a position to deliver to Strauss an assignment of a patent for the process, which is the very thing he contracted to sell. Nor has he ever made the slightest effort to comply with the agreement upon which he has now received $1,400 in money, and recovered judgment in this case for $600 additional, with interest thereon.

The value of a patent for an invention rests solely on the right of the inventor to exclude others from making, using or selling, his invention. To protect the inventor and those holding under him, Congress has enacted a statute providing for an exclusive method for making assignments of patents, or any interests therein. Section 4898, Revised Statutes of the United States, provides:

"Every patent or any interest therein shall be assignable in law, by an instrument in writing; and the patentee or his assigns or legal representatives may, in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the patent office within three months from the date thereof."

It does not appear in this case that Brier has ever had a written assignment of patent; or that any such written assignment to him has ever been made or recorded, as provided by the statute; or that he is in a position to secure and deliver to Strauss a valid assignment; or that he has made any effort to secure, deliver or tender to Strauss such assignment, which he clearly contracted to deliver, free and clear of incumbrance, and which he

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warranted to defend as against the legal claims of all other persons. So that in fact Strauss is not in possession of any legal or valuable right in connection with such alleged patent that may not actually belong to any other person. Nor does it appear that it is possible, by action at law or otherwise, for Strauss to compel a performance of the contract. Counsel for defendant in error contends that by the clause in the agreement, "and does hereby grant and convey to the party of the second part, his rights, privileges and benefits which he * * * now holds" constitutes the only conveyance contemplated. If Brier had any rights, benefits or privileges at the time, it was only the personal permission of Day to use the unpatented process, and an agreement to assign an interest in the patent in the event of its issue, covering the state of Colorado. If this language be said to refer to a government patent, then the assignment, to be valid, must be made and recorded as provided by the statute. The contract to sell, in question, clearly required a valid conveyance, and a *valid* conveyance in such case must necessarily be in writing. There can be no valid existing conveyance until it is recorded in the patent office. It is therefore the clear duty, and in this case a necessary prerequisite to the bringing of the suit, if the action might otherwise be maintained, that the plaintiff should have tendered such a conveyance. The defendant cannot be required to perform his part, and the plaintiff be permitted to perform or not, at his own will. In *Gilpin v. Watts,* 1 Colo. 479, it was said (pp. 482-3):

"It is true that the bill contains an offer to produce, subject to the order of the court, the conveyance which, it is averred, complainant had before tendered to the defendant; but there is nothing to show that such conveyance was, in fact, ever brought into court or delivered to any officer of court; and the original cause being determined by the final decree, it appears to us doubtful whether the defendant has any remedy to compel its production. The decree ought to be a final determination of the whole controversy, so far as the case made warrants.

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The purchaser ought not to be required to pay the purchase-money, and then resort to his motion or bill of review, or other process, if there be any effectual to this end, to secure a conveyance."

But the contract at best is a mere option. It contains no express or implied agreement on the part of Strauss to buy, nor to pay for the patent right. To make a contract of sale enforcible, there must be mutual obligations, and in such a case the covenant to convey and the covenant to pay are dependent obligations; each is a condition precedent to the other.—*Hoagland v. Murray,* 53 Colo. 50, 123 Pac. 664.

In this case, and for these reasons, the plaintiff is not entitled to recover under the agreement as originally made or as amended. The record discloses no equities in favor of the defendant in error. Indeed, the transaction upon his part may well be characterized in harsher terms. The judgment upon the two items under the second and third causes of action was upon different and independent transactions.

The judgment is reversed, with instructions to enter a judgment in favor of the plaintiff below in the sum of $63, the amount found to be due for merchandise and rent, and to tax the costs of the proceeding to the plaintiff.

MUSSER, C. J., and GARRIGUES, J., concurring.

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[No. 6265.]

CHENOWETH v. STATE BOARD OF MEDICAL EXAMINERS ET ALS.

Error to Denver District Court.—Hon. JOHN I. MULLENS, Judge.

Mr. CHARLES L. DICKERSON, for plaintiff in error.

Mr. HARRY E. KELLY and Mr. CHARLES H. HAINES, for defendants in error.

Per curiam.

This case is before us on error from the District Court denying petition for an injunction, asking to enjoin the State Board of Medical Examiners from the hearing and determination of a complaint, filed against the plaintiff in error, charging him with the publication of an advertisement relative to sexual diseases. Within the few days after the refusal of the injunction in this case, the Medical Board heard and determined the complaint in question and revoked the license of Dr. Chenoweth.

That case has been decided at this term of court, *Chenoweth v. State Medical Board, post,* No. 7177, 141 Pac. 132. Under this state of facts it can serve no useful purpose to proceed further with this case which for such reason is dismissed.

En banc.

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[No. 7177.]

CHENOWETH V. STATE BOARD OF MEDICAL EXAMINERS ET ALS.

1. CERTIORARI—*The Inquiry*, is limited to whether the court below exceeded its jurisdiction or greatly abused its discretion. (76)

2. POLICE POWER—*Extent of the Power.* The legislature may enact regulations for the examination and registration of those who would practice medicine. The only limit to the power is that the regulations prescribed shall be reasonable, and of this the courts must judge. (79)

The legislature has no power, under the guise of a police regulation to arbitrarily invade the personal rights and liberties of the individual citizen. (79)

Nor to confer upon a board of medical examiners authority to deny to a physician the right to advertise his business. (80)

3. STATE BOARD OF MEDICAL EXAMINERS—*Powers of the Board.* The statute authorizing the revocation of a physician's license for publishing an advertisement relative to any disease of the sexual organs (Rev. Stat. § 6068) is void for uncertainty, and in violation of the 14th amendment to the Federal Constitution and § 3 of our Bill of Rights. (86)

Error to Denver District Court.—Hon. GEO. W. ALLEN, Judge.

Mr. CHARLES L. DICKERSON and ROY E. DICKERSON, for plaintiff in error.

Mr. HARRY E. KELLY and Mr. CHARLES H. HAINES, for defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

On the 15th day of March, 1906, a complaint was filed with the State Board of Medical Examiners charging M. S. Chenoweth, duly licensed to practice medicine under the

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laws of the state, with publishing in the Rocky Mountain News, a newspaper published in the city of Denver, an advertisement relative to a disease, and diseases of the sexual organs. This was under section 6068, Revised Stat. 1908, authorizing the State Board of Medical Examiners to refuse to grant, or to revoke a license to practice medicine in this state upon the ground, among others given in the statute, of "causing the publication and circulation of an advertisement relative to any disease of the sexual organs."

The advertisements complained of are not set out in the complaint nor in the abstract of record, but there are newspaper clippings attached to the transcript of record which we assume to be the advertisements offered in evidence. A hearing was had on this complaint, by the State Board of Medical Examiners, and the license of Dr. Chenoweth revoked. A writ of certiorari was issued out of the District Court and upon a hearing before that court this writ was dismissed, from which ruling of the court the plaintiff in error brings the case here for review. The question as to whether certiorari is the proper remedy in this case is not raised or presented and we are not to be understood as passing upon that question.

The record discloses that the Medical Board preserved no testimony and we are left to the minutes of that body alone for information as to what occurred at the hearing upon the complaint filed. There were others tried at the same hearing, but other final disposition was made as to these cases, and the plaintiff in error alone, is now complaining.

The minutes of the board disclosed the presence of Dr. Chenoweth at the hearing, and his admission of responsibility for the publication by the Scott Medical

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Company, and the Dr. Myers Medical Company, both of which companies he apparently controls. Also a resolution by the board revoking his license to practice medicine, because of the fact of such publications alone.

It has been held by this court that the inquiry upon certiorari is limited to whether the court below exceeded its jurisdiction or greatly abused its discretion.—*People v. District Court,* 22 Colo. 422, 45 Pac. 402. Also that the object of the proceeding is to correct errors of law apparent from admitted or established facts, and not to settle those which are disputed.—*Hallet v. Board of Co. Com.,* 27 Colo. 86, 59 Pac. 733.

Further, that in Colorado there are two different proceedings by certiorari; one to review the action of an inferior tribunal or board of officers; the other to secure the trial *de novo* of causes previously heard by Justices of the Peace.—*Small v. Bischelberger,* 7 Colo. 563, 4 Pac. 1195.

The question then to be determined in this case is whether the Board of Medical Examiners was without jurisdiction, exceeded its jurisdiction, or greatly abused its discretion, and in this instance, is the statute, in so far as it relates to the particular ground for revocation, in violation of the constitutional rights of the plaintiff in error. There is no question but that the defendant caused the publication of the advertisements. There can be no reasonable question under the decisions of the courts of this state, and the law generally, but that under the police power inherent in the state, the legislature may enact reasonable regulations for the examination and registration of physicians in the practice of medicine and surgery, and that such statutes violate neither the Federal nor the state constitutions.

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Neither does the authority of the legislature end with declaring what qualifications he who enters upon the practice of that profession shall possess. "As it has plenary power over the whole subject, it alone must be the judge of what is expedient, both as to the qualifications required, and as to the method of ascertaining such qualifications. The only limit to the legislative power in prescribing conditions as to the right to practice is that they shall be reasonable, and whether they are reasonable the courts must judge." 30 Cyc. 1547.

That the state may create a board of experts authorized to examine and grant such licenses, and to hear and determine any complaint made against any person holding a physicians' license, and in a proper case to revoke the same is equally well settled. It is also true that while the power of a board so created is in the nature of a quasi judicial power, yet it is not such a power as cannot be granted by the legislature. Therefore, the only limit of the legislature in this respect is that it shall provide reasonable regulation. But the right is one of regulation only, and must be found in the power of the state to provide for the general welfare of its people.

The power of the legislature however, is not such as may unreasonably interfere with the undoubted right of every citizen to follow any lawful calling, business, or profession, he may choose, subject only to reasonable regulation; for the right to labor and to receive the fruits of such labor is a natural and inherent right always protected by the constitution.

The statutory ground in this case is "causing the publication and circulation of an advertisement relative to any disease of the sexual organs." The only statute of similar import brought to our attention is that of Nebraska, 4327 Neb. Comp. Stat. In that statute however,

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is found the qualifying words, "tending to injure the morals of the public." In the statute under consideration, the mere publication of the advertisement, regardless of its tendency, is sufficient to authorize the revocation of the license, and it must be presumed that the action of the board was based solely upon the fact of the publication, as it was authorized to do by the language of the statute. Under this statute then, no matter how harmless or innocent may be the publication, nor what may be the chasteness of its language, nor the utter absence of any tendency to injure the morals of the public, yet the very fact of the publication of the advertisement is sufficient to take from a physician his license and the right to practice his profession.

If this is to be justified under the statute then the very basis upon which rests such statutes of regulation must be ignored. For such legislation is justified only upon the ground of police power, and as tending to promote the public health, morals, safety or general welfare.

"The police power is limited to enactments which have reference to the public health or comfort, the safety or welfare of society. Laws which impose penalties on persons and interfere with the personal liberty of the citizen, cannot be constitutionally enacted, unless the public health, comfort, safety or welfare demands their enactment. It is for the legislature to determine when an exigency exists for the exercise of this power, but what are the subjects of its exercise is clearly a judicial question. The exercise of legislative discretion is not subject to review by the courts when measures adopted by the legislature are calculated to protect the public health, and secure the public comforts, safety or welfare; but the measure so adopted must have some relation to the ends thus specified."—(*Ritchie v. People,* 155 Ill. 98,

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40 N. E. 454, 29 L. R. A. 79, 46 Am. St. 315). The legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and personal liberty of the individual citizen. Its determination upon this question is not final or conclusive. If it pass an act, ostensibly in the exercise of the police power, but which in fact interferes unnecessarily with the personal liberty of the citizen, the courts have a right to examine the act and see whether it relates to the objects which the exercise of the police power is designed to secure, and whether it is appropriate for the promotion of such objects. When the police power is invoked for the purpose of regulating a useful business or occupation, and the mode in which that business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling, and to exercise his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment.—*Tiedeman on Lim. of Police Power,* § 3; *In re Jacobs,* 98 N. Y. 108 [50 Am. Rep. 636]; *People v. Gillison,* [109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465]; *Cooley on Const. Lim.* [6th Ed.] pp. 606, 607, 744; *Ex parte Whitwell,* 98 Cal. 73, 32 Pac. 872 [19 L. R. A. 727, 35 Am. St. Rep. 152]; *Frorer v. People,* [141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492]; *Town of Lake View v. Rose Hill Cemetery Co.,* 70 Ill. 191 [22 Am. Rep. 71]; *Ritchie v. People, supra; Ruhstrat v. People,* 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30.

It is not material for the purpose of this case, to determine whether the right to practice medicine be classed as a property right, as contended by the plaintiff in error, or as a mere privilege, as insisted by the board,

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for it must be conceded that it is a valuable right. The right to practice medicine in respect to its value is no different from the right to practice law, and of this Mr. Justice Field said in *Ex Parte Wall,* 107 U. S. 265:

"To disbar an attorney is to inflict upon him a punishment of the severest character. He is admitted to the bar only after years of study. The profession may be to him the source of great emolument. If possessed of fair learning and ability he may reasonably expect to receive from his practice an income of several thousand dollars a year,—equal to that derived from a capital of one or more hundred thousand dollars. To disbar him having such a practice is equivalent to depriving him of this capital. It would often entail poverty upon himself, and destitution upon his family. Surely the tremendous power of inflicting such a punishment should never be permitted to be exercised unless absolutely necessary to protect the court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession."

Advertisements by physicians may be regarded by certain members of the profession, as contrary to professional ethics, but with that legislatures and courts may not be concerned. The legislature has no power to confer the authority upon a Board of Medical Examiners, to deny to a physician the right to advertise his business.

Many statutes relating to the powers and duties of boards of medical examiners fix as cause for the revocation of a physician's certificate to practice medicine, such as "unprofessional and dishonorable conduct," "grossly immoral and unprofessional conduct, etc." These statutes have been generally sustained by the courts.—*State v. Medical Board,* 32 Minn. 324, 20 N. W. 238, 50 Am.

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Rep. 575; *Id.*, 34 Minn. 391, 26 N. W. 123; *Meffert v. Medical Board,* 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811; *Meffert v. Packer,* 195 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350; *Arton v. Medical Board,* 114 Pac. 962; *State v. Board of Health,* 103 Mo. 22; *Kennedy v. Board,* 145 Mich. 241, 108 N. W. 730, 9 Ann. Cas. 125. But these cases sustain such statutes upon the ground of public welfare and public morals. For it is as essential that a licensed physician shall be possessed of professional honor, as that the applicant for such license shall possess such qualifications. In one of these cases cited by counsel for the board in this case, it was said:

"We will add, as our construction of the words 'unprofessional or dishonorable conduct,' as used in section 9, that we do not think that the legislature contemplated matters of merely professional ethics, but that the term 'unprofessional' was used convertibly with 'dishonorable.' The meaning may be expressed by using the conjunctive *and* in place of the disjunctive *or.*—*Wert v. Clutter,* 37 Ohio St. 347, 350; *Weston v. Loyhed,* 30 Minn. 221, 14 N. W. 892." And in *Meffert v. Medical Board, supra,* the court said: "It is subversive of the morals of the people and degrading to the medical profession for the state to clothe a grossly immoral man with authority to enter the homes of her citizens in the capacity of a physician."

Doubtless a physician might publish an advertisement which would in itself be so grossly immoral as to constitute dishonorable conduct. But our statute contains no such ground as a cause for revocation, neither is it contended or charged, that either of the publications complained of, were of any such character or had such tendency. The character of the advertisement is simply charged in the language of the statute as "relative to a disease of the sexual organs."

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While we may not in this case enter into a consideration of the evidence, yet as illustrating the soundness of our conclusions, we note that the "Myers Medical Company," advertisement, and one for publication of which the license of Chenoweth was revoked upon the hearing, does not include the word "sexual" and contains no fairly inferred reference to a disease of the sexual organs. The only language in such advertisement that can be said to state or refer to any disease whatsoever is as follows:

"We treat and cure Catarrh and Stomach Troubles, Nervous Diseases, Kidney, Bladder Troubles, Heart Diseases, Diseases of the Stomach and Bowels, Piles, Fistula and Rectal Diseases, Female Complaints, Diseases of Women and Children; Rickets, Spinal Troubles, Skin Diseases, Deafness, Asthma, Bronchial and Lung Troubles, Consumption in the First Stages, Rheumatism, Hay Fever, Neuralgia, Hysteria, Eye and Ear Diseases, Goitre or Big Neck, La Grippe, Blood Diseases, Scrofula and all forms of Nervous and Chronic Diseases (that are curable)." Certainly there can be found nothing in this to justify the charge of an offense against the public morals. This but illustrates the settled principle of the law that such regulation statutes, to be justified, must be based upon the theory of protection of the public interest, the public morals or the public welfare.

The "Scott Medical Company" advertisement does not use the term "sexual organs," but in addition to the naming of diseases in no sense sexual, recites, "we successfully treat Weakness, Partial or Complete Loss, Lack of Power and Strength, complicated and Special Disorders of men only." These terms do not refer specifically to diseases of the sexual organs. They may possibly refer to resultant effects of diseases of the sexual organs,

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but just as possible to be produced from other causes. Hence, to sustain the statute we must construe a publication relating to a condition which may or may not have been the resultant effect of a disease of the sexual organs, as being within its purview.

Then how can such an advertisement be reasonably said to injuriously effect the public morals? Such a contention is both prudish and absurd. We can but take notice of the trend of the times, and of the fact that societies and large numbers of respectable and moral people, including physicians, are urging that sex hygiene be taught in our public schools, in the interest of the public good and public morality. The statute does not provide that a tendency to injuriously effect the public morals or welfare, shall appear as an essential fact to be considered in connection with such an advertisement. Neither does the complaint so charge. All of this tends to convey the impression that the purpose of the provision under consideration was to enforce the ethical notions of some members of a profession, rather than for the protection of the public at large.

We must not be understood as in any sense declaring for the restriction of the exercise of the police power as heretofore announced by this court, in cases where the purposes are plainly for the public good, for it is the tendency of courts to make such new and other application of this doctrine, as the ever changing conditions and protection of society may seem to require. But there is a necessary limit to the invasion of the inherent and constitutional rights of the citizen, beyond which legislative restriction may not go, if stable government is to remain.

"In *Powell v. Pennsylvania,* 127 U. S. 678, 32 L. Ed. 253, 8 Sup. Ct. 992, 1257, the general proposition, that the enjoyment by the citizen, upon terms of equality

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with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is a general part of his right to liberty and property as guaranteed by the fourteenth amendment, was assented to by the Supreme Court of the United States, as embodying a sound principle of constitutional law. In the latter case, it was also held, that, although the power and discretion which a State Legislature has in the matter of promoting the general welfare and of employing means to that end are very large, yet such power must be so exercised as not to impair the fundamental rights of life, liberty, and property."—*Ruhstrat v. The People,* 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. 30.

The expression in the constitution, "Life, liberty and the pursuit of happiness," is general in character, and includes many rights which are inherent and inalienable. Many of the rights referred to in this expression are included in the general guaranty of "liberty." The happiness here referred to may consist in many things, or depend on many circumstances, but unquestionably includes the right of the citizen to follow his individual preference in the choice of occupation.—Black on Const. Law 404. For these reasons we must conclude that the provisions of the statute that a physician's license may be revoked for "causing the publication and circulation of an advertisement relative to any disease of the sexual organs," is in violation of the fourteenth amendment to the constitution and sec. 3 art. 11 of our own Bill of Rights; "That all persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; and of seeking and obtaining their

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safety and happiness." The State Medical Board may act only within its statutory authority, and such provision of the statute being invalid, the acts of the board in this case were void.

The plaintiff in error contends also that the term "relating to a disease of the sexual organs" as used in the statute, is so indefinite and uncertain as to make the statute inoperative and invalid for that reason. The question naturally arises as to what we are to understand by the term "diseases of the sexual organs." To what authority are we to turn for a definition? Does this term have a common or well understood meaning, and if not, what authority are we to seek for a definition. Suppose that by such a statute the publication of an advertisement relating to a disease of the sexual organs was declared to be a public offense, and that thereby others than physicians might be amenable to such a penal law, which by the way is not the case, and for that reason it is likewise contended that the provision in the statute is class legislation, and for such reason void; and suppose that it became necessary for the court in a given case, to charge the jury as to what constitutes a "disease of the sexual organs." If the court turned to the statute he would find no definition as in case of murder, arson, larceny, etc. If he were to search law dictionaries and law text books he would be equally in the dark as to a definition of the term. If he were to examine Webster he would find no such expression, yet he must define this alleged wrongful thing to which the offensive publication relates, in order that the jury may have some notion as to whether or not the accused is guilty of committing the offense. Having exhausted lexicographers, law writers and court decisions without avail, he can have recourse only to his common knowledge and the definition of the

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words considered separately. He may have a very clear notion as to what the word "disease" means, but he cannot conceive that the use of this word, or of the specific names by which the multitude of diseases are known, the use of which names are so necessary to science and to the use of physicians and laymen alike, can be under any circumstances inherently harmful, or by law made so. If he considers the word "sexual," he finds that this is defined "as relating to sex," and that it includes both sexes. If he proceeds so far as to assume that such diseases arise solely from immoral acts, he must make additional unreasonable assumption. He must assume that the advertisement relates to a disease which is the result of immoral acts, else a mere publication relating to it, may not within the range of reason, be designated an offense.

Will it be said that more than a comparatively fair proportion of the diseases of sexual organs are the result of immorality? What will be said of tuberculosis, tumors, cancerous and other growths constituting diseases which effect every part of the human system. It is perhaps true that venereal diseases may be definitely said to be those arising from immorality, but who will have the hardihood to say that all sexual diseases are necessarily venereal diseases.

Will a court of justice sustain a conviction for an offense so abstractly named, so wholly undefined and so uncertain of definition, yet we are asked to sustain such a statute to the extent that a physician who may be charged with its violation is to be denied the right to practice his profession. Clearly, the statute is so indefinite as to render it invalid for that reason alone.

Beside, the penalty provided is so grossly excessive and unconscionable as to make the statute repugnant to

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every sense of justice if not to render it void for such reason.

Under its provision a physician who has spent many years and vast sums of money to qualify himself to practice medicine, who has spent many more years in the practice, and thereby established a reputation and a practice worth thousands of dollars to him annually, and yet if he shall publish an advertisement relating to a disease of the sexual organs, however humane may be the purpose, and however innocent of wrong may be the intent, he must have all this taken from him, and have the consequent ignominy and contempt heaped upon him in addition. And in his trial for the alleged offense he is to be denied the privilege of a hearing before a court of justice and the right of trial by jury. He may not have the same right that is accorded to ordinary offenders. The statute provides that "causing the publication of an advertisement relating to the sexual organs" shall be an offense only if by physicians. Any person other than a physician may publish such advertisements at will. If such publication tends to injuriously effect the public morals it is not by reason of the fact that the publication is caused by a physician. The effect is precisely the same whoever may be the publisher.

The offense, if it be one, is a public one, equally applicable to all persons. At the time of the action of the state board in this case, there was no statute making such publication an offense as against others than physicians. The statute under consideration makes the act an offense only when committed by a physician, and for such reason is clearly discriminatory in that it applies to a class of citizens only, and for such reason alone was void.

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The writer of this opinion speaking for himself, is of the opinion that in the interest of justice and fairness, the legislature might well provide for the right of appeal in such case, to the courts, where such a matter may be finally determined on its merits, as are other rights of citizens. Arbitrary and star chamber proceedings are abhorent to the American mind. There is no sane reason why a physician once found to be qualified in all respects to practice his profession, should not be permitted to have his rights ultimately and finally determined by a court of justice.

The judgment of the trial court is reversed and the case remanded with instructions to enter judgment directing the State Board of Medical Examiners to cancel its order revoking the license of the plaintiff in error to practice medicine in the state of Colorado, and to restore to him such rights and privileges in the premises as he may have been entitled to prior to such act of revocation.

En banc.

MUSSER, C. J., CARRIGUES J. and WHITE J. concur.

BAILEY J., GABBERT J. and HILL J. dissent.

Mr. JUSTICE GABBERT dissenting:

The police power of the state may always be exercised to protect the public morals, and its exercise of this power is valid when regulations of this character tend to accomplish the purposes for which they were enacted. The statute under consideration provides that the State Board of Medical Examiners may refuse to grant or may revoke a license to practice medicine in this state for sev-

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eral causes, among which is, "causing the publication and circulation of an advertisement relative to any disease of the sexual organs." One purpose of these regulations, and the only one necessary to consider, is to protect the public morals, by prohibiting alleged physicians who have obtained a license to practice, from publishing and circulating advertisements of a nature that would tend to injuriously affect the morals of the community where the inhibited advertisements might be circulated and read. It needs no argument to demonstrate that advertisements of the kind prohibited are unfit to find their way into homes through the medium of the press, and that to the youth of either sex, at least, they are demoralizing. It is, therefore, apparent that the clause of the act in question which is under consideration, is a valid exercise of the police power of the state. It is also clear, if that question is before us, that the advertisements which the doctor caused to be published fall within its inhibition, for the reason that they unquestionably relate to diseases of the sexual organs, and refer to that class of diseases in as unmistakable terms as though the words "sexual organs" appeared in the advertisements.

The judgment of the district court should be affirmed.

The writer is authorized to state that Mr. JUSTICE HILL and Mr. JUSTICE BAILEY concur in this opinion.

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[No. 7491.]

DENVER AND RIO GRANDE RAILROAD COMPANY v. FREDERIC ET AL.

1. PLEADING—*Complaint Construed.* Action against a railway company under Rev. Stat. § 2056, the complaint alleging that the train whereon deceased was being carried "was by defendant and its officers, agents and servants so negligently, carelessly and unskillfully operated that it collided with another train." *Held* that the charge of negligence against the company itself was mere surplusage, not impairing the effect of the allegation of negligence by the officers, agents and servants; that the word "operated," included everything contained in the expressions of the statute, and that everything necessary to maintain the action under the statute was sufficiently stated. (90, 94)

2. DEATH—*Action For—Statute Construed.* The purpose of section 2056 of the Revised Statutes is to protect human life against the fatal consequences of negligence, unskillfulness, or criminal intent, on the part of any officer, agent or servant of any corporation or natural person, in operating any locomotive, car, or train of cars.

The statute is purely penal. The amount of the recovery thereunder depends solely upon the degree of culpability of the defendant. The age or youth, strength or infirmity, capacity or incapacity of the deceased are without effect upon this question. (96)

And the right of recovery does not depend, in the least, upon whether, if death had not ensued the injured person could have maintained an action for the injury. (97)

Under Rev. Stat. §§ 2057, 2058, the amount of the recovery for a wrong resulting in the death of a human being is to be determined by the prospective accumulations of the deceased, having reference to his age, occupation, habits, health, and earning capacity. 96, 97)

3. ——*Defenses to the Action—Free Pass.* In an action under Rev. Stat. §2056 that the deceased was riding upon a free pass, stipulating that the passenger "assumes all risks of accident and * * * the company shall not be liable, under any circumstances, whether of negligence by its agents or others" is no defense to the action. (106)

4. ——*Evidence*, as to the habits, character, age, health and earning capacity of the deceased, or his contribution to his parents is inadmissible. Its admission is fatal error because it is impossible to say how far it may have affected the award of the jury. (105)

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Appeal from El Paso District Court.—Hon. J. W. SHEAFOR, Judge.

Mr. E. N. CLARK, Mr. J. G. MCMURRY, for appellant.

Mr. R. L. HOLLAND, Mr. TAYLOR R. YOUNG, Mr. WILLIS L. STRACHAN, for appellees.

Mr. JUSTICE BAILEY delivered the opinion of the court:

The suit was filed in the District Court of El Paso County December 8th, 1909, by appellees, the parents of the deceased, against the railroad company, appellant, alleging that by its own careless, negligent and unskilful acts, and those of its officers, agents, servants and employes, in operating one of its trains, the death of Frank G. Frederic, their unmarried son twenty-seven years old, was occasioned. On the 14th of August, 1909, deceased was riding on the defendant's north bound passenger train on a free pass, and met his death through a head-on collision between that and another passenger train of the company, near Husted, Colorado. The company admits negligence as charged, but contends that the complainant and proofs fail to make out a case under the statute; and it also relies upon the following agreement in the free pass to negative liability:

> "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by its agents or otherwise, for any injury to the person or for any loss or damage to the property of the passenger using this ticket, who hereby agrees that the company shall not be considered as a common carrier, or liable as such.

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"Not good unless signed by the person named hereon, and if presented by any other person the conductor will take up this ticket and collect fare." (signed).

The action was brought under section 2056, R. S. 1908, which reads as follows:

"Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe, whilst running, conducting or managing any locomotive, car or train of cars, * * * the corporation, individual or individuals in whose employ any such officer, agent, servant, employe, master, pilot, engineer or driver shall be at the time such injury is committed, * * * shall forfeit and pay for every person and passenger so injured, the sum of not exceeding five thousand dollars and not less than three thousand dollars, which may be sued for and recovered:" etc.

Upon trial, the court instructed the jury that their verdict under the pleadings and evidence should be for the plaintiffs for not less than three thousand, nor more than five thousand dollars, the award being for the larger sum. The court overruled a motion for a new trial and entered judgment on the verdict, which the company brings here for review.

The first objection is that the complaint fails to state, and the proofs to establish, a cause of action under the statute upon which plaintiffs rely. It is alleged that "said train was by defendant and its officers, agents and servants, so negligently, carelessly and unskillfully operated that it collided violently head-on with another train of the defendant company," while the language of the statute allows recovery for the death of any person resulting from the "negligence, unskillfulness or criminal intent of any officer, agent, servant or employe, whilst running, conducting or managing any locomotive, car or

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train of cars," etc. The contention is that the negligence of the company, as such, is not covered by the provision, but rather that the statute applies only to officers, agents, servants or employes, and is limited solely to acts of negligence committed by such persons whilst running, conducting or managing any locomotive, car or train of cars. In particular it is urged that the statute does not apply to the negligence of a person who does not engage at any time in the actual running, conducting or managing of locomotives, cars or trains. A somewhat similar contention was made in *Whittle v. Denver & Rio Grande Railroad Co.*, 51 Colo. 382, 118 Pac. 971, a case where in a suit brought under the same provision it was sought to hold the railroad company liable for the negligence of its station agent, in failing to communicate train orders to the train crew, resulting in a head-on collision. Those facts were set out at length in the complaint, it being there contended that it was the purpose of the statute to limit its provisions to those employed in the immediate charge of the train. But this court declined to assent to that narrow construction, and reversed a judgment of dismissal, following the election of plaintiffs to stand by their complaint, to which a general demurrer had been sustained below, and remanded the case. While we do not commend the complaint under consideration as a model, still that it fairly meets the essential requirements of the section under which the action was brought cannot well be doubted. Charging negligence directly against the company, if a fault, may be regarded as surplusage, and certainly does not constitute serious or reversible error. Negligence was also charged against the officers, agents and servants of the company in operating the train. The allegation that the officers, agents and

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servants of the company so carelessly, negligently and unskillfully operated the train is equivalent to charging that this was done by some one or more of them while engaged in running, conducting or managing the train, so that a case was made out under the provision in question, especially in view of the *Whittle* decision, *supra*. This is equally true even though the word "operate" may be said to be of broader significance than the expression "whilst running, conducting or managing any locomotive, etc." The word "operate" would certainly include and cover everything contained in the statutory expression, even though it might include matters outside and beyond that. It is, therefore, apparent that if, in fact, the accident was due to negligence of the character contemplated by the statute, such negligence was included in the allegations of the complaint, and the objection that those allegations are too broad cannot be taken in the manner proposed. It may well be that the complaint was subject to a motion to make more specific, or to a special demurrer, but even so, it by no means follows that a cause of action such as contemplated was not stated. The answer admits negligence as charged, and as we hold that the allegations of the complaint include a cause of action under the statute, proof to show just why and precisely how the accident happened was unnecessary.

Other matters urged on this review consist largely in the alleged improper admission and rejection of testimony. First, the court admitted over objection evidence of deceased's earning capacity, habits, character, and contributions made to his father and mother during his lifetime, as a basis for establishing pecuniary loss; and second, the defendant company offered the free pass in

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evidence, to prove the contract relied on to acquit it of liability, which was rejected on objection by counsel for plaintiffs.

The first proposition involves the question of the character of the section quoted, whether penal or compensatory. If penal, the evidence offered as to the earning capacity of deceased and the like was improperly admitted, but if compensatory, then such evidence was competent.

We have separate statutory provisions authorizing civil actions to recover for the wrongful death of persons caused by negligence, which are essentially and diametrically different in their characters, purposes and objects: section 2056 fixes a penalty for wrongfully causing the death of another under the particular circumstances and conditions therein provided; and sections 2057-2058 give a right to recover damages as compensation for the wrongful death of a person caused by or resulting from the negligence of any person or corporation, dependent upon whether the deceased would have had a cause of action for damages if he had been injured only. These sections read as follows:

> "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable for an action for damages notwithstanding the death of the party injured.
>
> "All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in the first section of this act, and in every such action the

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> jury may give such damages as they may deem fair and just, not exceeding five thousand (5,000) dollars, with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default."

Under section 2056 the amount of recovery is placed at not more nor less than certain sums, without reference to the earning capacity of deceased or amount of damages inflicted, but depends solely upon the degree of culpability of the wrongdoer, the precise amount of which is to be fixed by the jury either at the minimum or maximum, or at some amount between these limits, under proper instructions. The fact that no matter how young or old, how infirm or useless the deceased, the recovery for his death, under this provision, is precisely the same, depending on the character of the defendant's failure of duty, as it would be had he been in the prime of life, having the highest capabilities and attainments, mentally and physically, demonstrates with unerring certainty the purpose of the legislature to make it a punitory section pure and simple. That it contains no provision for assessing damages on the basis of pecuniary loss, as in the compensatory provisions, is another evidence of its penal character; indeed, the fact that recovery may be had under it without any proof whatever of damages conclusively establishes that it is penal.

Sections 2057, 2058 are distinctively and by express terms compensatory provisions, authorizing an action for damages as compensation for the death of a person caused by the wrongful act, neglect or default of another, where such wrongful act, neglect or default is such that if death had not ensued the party injured could have maintained an action for damages. Under these sections

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the amount of recovery is to be determined from the prospective accumulations of the deceased had he not been killed, having reference to his or her age, occupation, habits, bodily health and ability to earn money. Compensation as damages under these sections is based on the reasonable expectation of benefit which a plaintiff may have a right to indulge from a continuance of the life of the deceased.

The right of recovery under section 2056 does not depend in the least upon whether the injured person could have maintained an action for injuries if death had not ensued, but is an absolutely new and independent cause of action, unknown to the common law, and exists only where death results from an injury occasioned in the particular manner and form as therein prescribed. By the compensatory sections it is manifest that it was the intent and purpose of the legislature to give a cause of action only in case the person injured would have had such a right had death not ensued, provisions in effect to preserve a cause of action; indeed, such purpose is expressly stated. That the right of action under section 2056 does not depend upon whether the injured person, if death had not ensued, could have recovered for personal injury, is one of the essential characteristics which distinguishes it from the compensatory provisions, where the right exists only on the theory that the person injured would have had a cause of action had he not been killed. It was, without a doubt, the presence of sections 2057, 2058 in the act which lead this court to declare, in *A. T. & S. F. R. R. Co. v. Farrow,* 6 Colo. 546, that the purpose of the act is to keep alive a right of action which otherwise would have perished under the rule of the common law. There is no such purpose or intent, either ex-

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press or implied, in section 2056. The conclusion reached on this proposition in the *Farrow* case seems to apply only to a cause of action under the compensatory provisions, and not to one under the penal section. Such conclusion in that case can be justified and upheld only upon the theory above advanced, for it is so plain that section 2056 creates a new cause of action where none at all existed before in favor of any one, to-wit, for the recovery of a penalty for the death itself, that there is no room for a difference of opinion on the subject. The following decisions so hold and are precisely in point: *Garret v. L. & N. R. Co.*, 197 Fed. 715, 117 C. C. A. 109; *Osteen v. Southern Railway*, 76 S. C. 368, 57 S. E. 196; *Beavers' Admx. v. Putnam's Curator*, 110 Va. 713, 67 S. E. 353; *Fink v. Garman*, 40 Pa. 95; *Davis v. Railway*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; and *Matz v. Chicago & A. R. Co.* (C. C.) 85 Fed. 180. But if it be insisted that the decision in the *Farrow* case on the question under consideration was intended to and does apply to section 2056, then it becomes important to note that in that case there was no issue tendered which even warranted, much less required, the court to determine that precise matter, and therefore what is said in the opinion in that connection is *dicta*, and while persuasive, is neither conclusive nor controlling.

The purpose and policy of the section manifestly is to guard and protect human life against the fatal consequences of the negligence, unskillfulness or criminal intent of any officer, servant, agent or employe of any common carrier, whether a corporation or individual, while engaged in running, conducting or managing any locomotive, car or train of cars, or other public conveyance. Undoubtedly the provisions was intended to enjoin upon

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such representatives the utmost skill and diligence in the discharge of their important duties as guardians of human life, and upon the carrier itself the exercise of great care and caution in their selection, to the end that better service be secured, with fewer accidents and less destruction of life. The recovery, whatever it may be in amount, is denominated a forfeiture, and the fact that it goes to the next of kin cannot be said to affect or change the character of the provision, as clearly indicated by its express terms. It would have been quite as competent for the legislature to have awarded the penalty to the public school fund, or in the nature of a fine to the general treasury of the state, as it was to authorize its recovery by those named in the statute, and had that been done there could have been no doubt of its penal character.

Similar provisions have been considered and construed by many other courts, and so far as we have been able to ascertain they have been uniformly held penal. Section 212 of Chapter 112, Public Statutes of Massachusetts 1882, reads as follows:

> "If by reason of negligence or carelessness of a corporation operating a railroad or street railway, or the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of a passenger or of a person being in the exercise of due diligence and not a passenger or in the employment of such corporation is lost, the corporation shall be punished by fine of not less than five hundred dollars or more than five thousand dollars, to be recovered by indictment prosecuted within one year from the time of the injury causing the death, and paid to the executor or administrator for the use of the widow and children of the deceased in equal moieties; or if there are no children to the use of the widow, or if no widow to the use of the next of kin; * * * If the corporation is a rail-

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road corporation it shall also be liable in damages not exceeding five thousand dollars nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the corporation or its servants or agents, and to be recovered in an action for tort commenced within one year from the injury causing the death by the executor or administrator of the deceased person for the use of the persons hereinbefore specified in a case of indictment."

The supreme court of Vermont was the first to construe this statute, and held it penal, *Adams, Admx. v. Railroad Co.*, 67 Vt. 76, 30 Atl. 687, 48 Am. St. 800, speaking in the opinion to that point as follows:

"The plaintiff claims to recover by virtue of the provisions of a public statute of Massachusetts. The suit cannot be maintained if the statute declared upon is held to be penal. *Blain v. Curtis*, 59 Vt. 120, [7 Atl. 708, 59 Am. Rep. 702]. So far as we are informed by counsel or have been able to ascertain by examination, no construction has been placed upon this statute by the Massachusetts court. It thus becomes necessary for us to give to the statute our own interpretation. * * * A statute giving a right of recovery is often penal as to one party and remedial as to the other. It is said that in such cases the true test is whether the main purpose of the statute is the giving of compensation for an injury sustained, or the infliction of a punishment upon the wrongdoer. We think an application of this test to the provision in question shows it to be penal. The foundation of the action is the loss of a life by reason of the defendant's negligence. There was no right of action at common law. This statute gives a right of action to the personal representatives of the deceased, for the benefit of the widow and children, or widow, or next of kin. If the right of recovery is established, the damages are to be five hundred dollars in any event. Any recovery beyond this is to be assessed with reference to the degree of the defendant's culpability. * * * Here there is no ascertainment of the loss suffered, and

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as far as the amount of the verdict is left to the judgment of the jury, it is to be determined by the culpability of the defendant's act, regardless of the injury resulting from it to the persons for whose benefit the suit is brought. * * * It is difficult to say that an assessment which is made to depend solely upon the degree of the party's culpability is not primarily meted out as a punishment. The sum is to be determined by the very considerations that would govern a court in fixing a fine for involuntary manslaughter. The fact that it is given to persons whom the law would have entitled to share in the estate of the deceased cannot control the construction. A statute may be penal, although the entire amount recovered be given directly to the party injured."

Soon after the Vermont decision the Massachusetts court was called upon to consider the same section, and also held it penal, *Doyle v. Fitchbury Railroad,* 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. 335, where this was said:

"In considering the contract on the back of the ticket, the fact that the statute is a penal one must also be borne in mind. The word 'damages' is not used in a strictly legal sense. *Sackett v. Ruder,* 152 Mass. 397, 403, [25 N. E. 736, 9 L. R. A. 391]. Damages are to be assessed not less than and not more than a certain amount, and with reference to the degree of culpability of the corporation, its servants or agents. Originally the remedy was by indictment. Afterwards it was extended to an action of tort. * * * It (amount of recovery) is in substance a penalty given to the widow and children and next of kin, instead of to the Commonwealth, and as such the intestate could not release the defendant from liability for it."

The statute of New Mexico on this subject is substantially like the section here under consideration, except only that the amount to be recovered thereunder is fixed at a single definite sum. The question of its extra-

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territorial force arose in Kansas, *Dale v. Railroad Company,* 57 Kan. 601, 47 Pac. 521, and the Supreme Court holding it to be penal, declined jurisdiction to enforce it, saying:

> "Another and perhaps more serious difficulty lies in the penal character of the statute of New Mexico. Although it is argued that the law of that Territory provided for the payment by the wrongdoer of a sum of money to his widow, or minor children, and that they are the ones usually, if not invariably, most injured by his death, and that the money to be paid under the statute subserves really the same purpose as money paid under the laws of Kansas, and compensates them in some degree for the loss of the husband and father, yet it is apparent that the theory of the law of the two States is different. In Kansas it is strictly compensatory. In New Mexico it may be strictly penal; for it might happen that the person killed was a burden upon his family, contributing nothing to them."

The supreme court of Illinois refused to enforce in that jurisdiction a like statute of Missouri, because penal, *Raisor v. C. & A. R. R. Co.,* 215 Ill. 51, 74 N. E. 71, 106 Am. St. 153, 2 Ann. Cas. 802, and in that connection had this to say:

> "The language of the statute (sec. 2864) is, 'shall forfeit and pay for any person or passenger so dying, the sum of $5,000.00, which may be sued for and recovered,' etc. The plaintiff is not required to prove any damage, but only that the death was occasioned by such defect, negligence or criminal intent as is mentioned in the section and averred in the declaration. * * * By the terms of the statute, and as it is administered in Missouri, whether the plaintiff has or not suffered pecuniary loss or damage is immaterial. His right to recover depends solely on the plaintiff's relation to the deceased and the culpability of the defendant, within the meaning of the statute and as averred in the declaration. From this it necessarily follows that a

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plaintiff who has suffered no damage, but has been relieved, by the death, of a pecuniary burden, may recover $5,000.00. If, in any case, any part of the amount recovered may be deemed compensatory, this is merely incidental, the primary object of the statute being punitory."

In a recent case, *Young v. Railroad Company*, 227 Mo. 307, 127 S. W. 19, the Supreme Court of that state had under consideration a Missouri statute on this subject in every essential identical with the one now before us. A former statute of that state on the subject had been amended by adding the words "as a penalty," so as to make the provision read "shall forfeit and pay as a penalty for every such person, employe or passenger so dying the sum of not less than $2,000, and not exceeding $10,000, in the discretion of the jury, which may be sued for and recovered, etc." The opinion therein is the very latest expression of that court upon the nature and character of such provision, upon which point it spoke as follows:

"The words 'as a penalty' inserted by the amendment add nothing to the meaning or effect of the section. * * * If it be a case in which the damages as for compensation to the person injured be in question, the jury after assessing compensatory damages may, in a proper case, look into the character of defendant's conduct to see if punitive damages should also be awarded. In the case at bar, however, the damages are not given as compensation to the party aggrieved, but as a penalty which the law prescribes for the negligent killing of a human being; it is all penal in its character and in fixing the penalty the jury have a right to consider the conduct of the negligent party beyond the mere finding that he was negligent; they may consider whether the conduct which resulted in the catastrophe arose from mere inattention, or was wilful, wanton or reckless. That is what the jury does in assessing the punishment for a crime and it is what

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the amendment of 1905 to section 2864 authorizes the jury to do in assessing the amount of the penalty under that section of the statute."

In *Marshall v. Wabash Railway Co.*, 46 Fed. 269, (C. C.) in a well considered opinion, the Federal Circuit Court for the southern district of Ohio, in a case involving the enforcement there of the Missouri statute on this subject, held the statute distinctively penal, and declined jurisdiction because statutes of that nature could be enforced only within the sovereignty of their creation.

The fact that for several years prior to the adoption of section 2056 we had on our statute books broad and comprehensive compensatory provisions, under which every conceivable action for damages resulting from the negligence of persons or corporations causing the death of a person could be maintained, is strongly confirmatory of the view that this latter section was intended to be and is penal. There was no field to be occupied by any further enactment providing for the recovery of compensatory damages, and unless section 2056 be penal it is without a function to perform or a purpose to serve.

Since we hold the statute penal, it was improper to allow plaintiffs to prove damages because of the loss of the services of and support by their son; indeed, that element is not involved in this action in the slightest, and cannot be under our construction of the provision in question. To make out a case in the first instance the plaintiffs had only to show that the defendant was a common carrier, that the negligence charged was the proximate cause of the death of their son, was of the character described in the statute, and their relationship to the deceased. Whether the plaintiffs did in fact suffer pecuniary loss or damage is wholly immaterial. The amount

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of recovery depends solely on the degree of culpability of the defendant and cannot, when a cause is made out, be less than $3,000, and may go to $5,000 in the discretion of the jury, depending on the nature and quality of the wrongful act of which complaint is made. Because of the character of the statute, and the rights of the plaintiffs and the liability of the defendant as therein defined, it is plain that the evidence showing the character, habits, health, age and earning capacity of the deceased, and the contributions by him to the support of his parents, was inadmissible.—*Fruchey v. Eagleson,* 15 Ind. App. 88, 43 N. E. 146; *Marshall v. Wabash Railway Co., supra; Philpott v. Missouri Railway Co.,* 85 Mo. 164; *Adams, Admx. v. Railroad Company, supra; Dale v. Railroad Company, supra; Raisor v. C. & A. R. R. Co., supra; Young v. Railroad Co., supra.* While we do not say, under the facts of this case, that with that testimony omitted the jury might not have properly returned a verdict for the amount which it did return, we leave that question open, still it is plainly impossible to determine what the verdict of the jury might have been had no such testimony been before it. It was the right of the defendant to have the finding of the jury upon the amount of the award with no testimony before it bearing on the question other than such as was competent and proper in that connection for it to consider. It is out of the question, upon any logical, fair or reasonable theory, to hold that the admission of this testimony was not harmful. On the contrary, it is quite reasonable to assume that, but for it, the verdict might have been less, possibly not more than the minimum amount which the statute allows. The fact that this testimony was permitted to go to the jury for consideration in arriving at the amount of their verdict is such prejudicial error as necessitates a reversal of the judgment.

From the nature, purposes and objects of the statute, as herein declared, it is manifest that the cause of action is one in which the deceased had no interest at all, and from the liability for which he could not relieve the

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company by a contract with it. It, therefore, follows that the pass, and the contract included in it, offered in evidence, was incompetent and immaterial, and was properly excluded.—*Doyle v. Fitchburg Railroad, supra; Clark v. Geer,* 86 Fed. 447, 32 C. C. A. 295; *Tingley v. Long Island Ry. Co.,* 109 App. Div. 793, 96 N. Y. Supp. 865; *C., R. I. & P. Co. v. Martin,* 59 Kan. 437, 53 Pac. 461; *Weir v. Roundtree,* 173 Fed. 776, 97 C. C. A. 500, 19 Ann. Cas. 1204; *Littlejohn v. Fitchburg R. Co.,* 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502; *Jones v. Boston, etc., Ry. Co.,* 205 Mass. 108, 90 N. E. 1152.

The judgment is reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

CHIEF JUSTICE MUSSER and MR. JUSTICE WHITE concur.

[No. 7786.]

TROWBRIDGE v. BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY.

COUNTY—*Not Liable for Office Expenses of Assistant District Attorney.* The act of 1907 (Laws 1907 c. 172) contemplates the maintenance of but one office of the district attorney, in each county of his district, and the district attorney himself, is authorized to contract, and recover from the county, the attendant necessary expenses. (108)

No statute imposes upon the assistant district attorney the duty to maintain an office, or makes the county liable for the expenses thereof. (108)

Error to El Paso District Court.—Hon. W. S. MORRIS, Judge.

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Mr. HENRY TROWBRIDGE, *Pro se.*

Mr. CLARENCE M. HAWKINS, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

Complaint was filed in the district court of El Paso County March 12, 1909. It alleges, in substance, that the plaintiff, Trowbridge, was during the times therein mentioned the duly appointed, qualified and acting assistant district attorney for the fourth judicial district, which includes the county of El Paso; that for the purpose of performing the duties of such office imposed by law, for the benefit of that county, he was obliged to, and did, keep and maintain therein an office and telephone; that he necessarily incurred expenses for office rent, lighting, telephone, etc., aggregating $513.33; that upon presentation of such claim duly verified to the defendant, The Board of County Commissioners of El Paso County, the same was disallowed; that no part of such claim and demand has been paid. To this complaint a general demurrer was sustained, plaintiff elected to stand by his cause as thus made, the complaint was thereupon dismissed and judgment was entered for the board of commissioners for costs. Plaintiff brings the case here for review.

The act of 1907, concerning expenses of district attorneys, is involved. Laws 1907, p. 371. Sections 1 and 2, respectively, read as follows:

> "Except as otherwise specifically provided, the district attorney of each judicial district in the State of Colorado, and each of his assistants and deputies, shall be allowed to collect and receive from each of the counties in his district the expenses necessarily incurred in the discharge of his official duties for the benefit of such county.
>
> Except as otherwise specifically provided, the district attorney of each judicial district in the State of

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> Colorado shall be entitled to collect and receive at the end of each year, of and from each of the respective counties in his judicial district the necessary expenses of maintaining an office for the transaction of his official business, which expenses shall be borne by the various counties in his judicial district, each in proportion to the fees earned by said district attorney in such county during such year."

Section 2 specifically provides for proportional payment by each county in a judicial district of the necessary expense of maintenance of an office by the district attorney for the transaction of official business therein. The provisions of section 1 relate generally to expenses necessarily incurred by the district attorney, his assistant and deputies, in the discharge of official duties.

The complaint affirmatively shows that liability for the account sued upon was incurred in keeping an office where the official business of plaintiff, as an assistant district attorney, was transacted. The act contemplates the support of but one such office in each county, and the district attorney alone is thereby empowered to contract and recover the expenses necessarily attached to and attending it. This is the plain meaning of the statute. It would be unreasonable to hold that the act contemplates that the district attorney, his assistant and deputies may each maintain separate offices, as such officers, in each county of a judicial district, upon the claim that the expense is necessarily incurred in the performance of official duties imposed by law, and such would be the effect of conceding plaintiff's contention. There is no law requiring, and therefore no duty imposed upon, an assistant district attorney to have and keep an office in his official capacity, nor is there any provision which warrants him in doing so at the expense of the county on the ground that it is a necessary expense incurred in the performance of official duties. No case has been cited by plaintiff which is in point, or of the slightest assistance in construing the statute under consideration. We have no manner of doubt about the impropriety and

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invalidity of plaintiff's claim. The demurrer to his complaint was properly sustained.

Judgment affirmed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE WHITE concur.

[No. 7812.]

JAHL v. LEWIS.

PLEADINGS—*Prayer—Execution Against the Body*, is not to be awarded upon judgment by default, unless expressly demanded in the complaint, even though the complaint states a cause of action entitling plaintiff to the process if it had been prayed (Rev. Stat. § 3024, Rev. Code § 186.) (112)

Error to Denver District Court.—Hon. JAMES H. TELLER, Judge.

Messrs. MULLINS & HELLER and Mr. FRANK MCLAUGHLIN, for plaintiff in error.

Mr. LAWRENCE LEWIS, for defendant in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

In the court below, the plaintiff Lewis filed his complaint against the defendant Jahl, praying for "judgment against the defendant for compensatory damages in the amount of $750.00, with interest thereon at eight per cent. per annum, from the eighteenth day of December, A. D. 1909, less fifty dollars, and for his costs herein; and that in addition thereto the plaintiff have judgment against the defendant for punitive damages in the sum

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of $500.00." A summons was issued and served upon the defendant, which stated that the action was in the nature of an action for deceit, to recover the compensatory and exemplary damages set out as they were in the prayer. The defendant made no appearance. His default was entered and judgment rendered thereon for $825.00 and costs, and further that the plaintiff have execution against the body of the defendant, and that the latter, on such execution, be confined in the county jail for nine months, or until the judgment be paid and satisfied. Later the defendant moved to modify the judgment by striking out the part thereof relating to the execution against the body, on the alleged ground that it was improperly ordered. This motion was overruled. The defendant then moved to set aside the judgment, and therewith tendered an answer, which motion was also overruled.

Neither in the complaint or the prayer, nor in the summons was there any intimation that the plaintiff desired or intended to invoke the extraordinary remedy of an execution against the body of the defendant. While the complaint contained allegations of fraud and willful deceit, and the summons stated that it was an action in the nature of one for deceit, and that the defendant had obtained a loan of money from the plaintiff through fraud, yet the statutory relief on account of such wrongs that was requested by the plaintiff was a money judgment for exemplary damages as provided in sec. 2067 Rev. St.

The prayer of the complaint and the summons apprized the defendant that the relief sought by the plaintiff was a money judgment, the costs, and, at most, an ordinary execution for enforcement. Sec. 3024 Rev. St. provides, "In any civil action, pending or hereafter brought in a court of record * * * where it shall appear from the summons and other papers in the cause, that the action is founded upon tort * * * the plaintiff may have execution as hereinafter provided against the body of any defendant," etc.

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The action was a civil action brought in the district court. Sec. 1 of the code of civil procedure provides that a civil action shall be prosecuted and defended as provided in that code. Chapter 11 of the Rev. Code, '08 relates to judgment by default, and sec. 2 thereof, being gen. sec. 186, is as follows:

> "The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

The preceding sec. 185 provides that in an action arising upon contract for the recovery of money or liquidated damages only, the clerk shall enter the default of the defendant, and immediately thereafter, if the complaint is verified, enter judgment for the amount specified in the summons. And in other actions the clerk or judge shall enter the default, and, thereafter, the plaintiff may apply at any time to the court or judge for the relief demanded in the complaint. Sec. 55 of the Code provides what a complaint shall contain, and the third and last thing mentioned is a "demand for the relief which the plaintiff claims, and if the recovery of money or damages be demanded the amount thereof shall be stated."

This demand for relief, which a plaintiff claims, is generally referred to as the prayer, and when sec. 186 speaks of what is demanded in the complaint, it undoubtedly refers to the demand or prayer mentioned in sec. 55.—*Russell v. Shurtleff*, 28 Colo. 414 at 420, 65 Pac. 27, 89 Am. St. 216. In *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. 803, speaking with reference to the effect of sec. 150 Code 1883, which was the same as sec. 186 Rev. Code '08, this court said, that the office of the prayer for relief required by sec. 55 aforesaid "would seem to be that of indicating the relief allowable where no answer is filed; in contested cases the prayer is a matter of no significance."

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The relief which a plaintiff may have is a judgment and the means of enforcing it. The judgment is but a part of the relief, for without the remedy or means of enforcement the judgment can not be made effective. It may be conceded that a demand for judgment for a certain amount of compensatory damages and a certain other amount of exemplary damages, carries with it a demand for an ordinary execution against the property of the defendant, and that on default, for failure to answer, the court may, on such demand, render a money judgment, and order an ordinary execution, though the latter is not specifically prayed for. A defendant cannot say that an ordinary execution was not demanded, in such a case, to collect the judgment asked for; for it goes without saying that if a plaintiff obtains a simple money judgment it is his intention to endeavor to collect it by ordinary means. A money judgment comprehends an execution against the property of the defendant. However, a judgment must include something more than a mere judgment for money before an execution will issue against the body of a defendant. The court must enter the term, not exceeding a year, for which he shall be committed to jail. Sec. 3025 Rev. Stat. In case of a simple money judgment, only the property of the defendant can be taken from him, while in case of a judgment that will support the extraordinary relief of a body execution, he is deprived of his personal liberty. So that a demand for a money judgment only, which will include a demand for an ordinary execution against property, is one thing, while a demand for a judgment that will support an extraordinary execution against the body, under a highly penal statute, is another.

It may be argued that the relief granted in this case was consistent with the case made by the complaint, and that the court made the proper findings to support that relief. That may be so, and had there been an answer, the judgment may not have been erroneous, in view of the opinion in *Kayser v. Maugham, supra;* but there was no answer, and in such a case the statute plainly says

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that the relief granted shall not exceed that demanded in the complaint. The exact question has never been passed upon by this court. In *Wilbur v. Maynard*, 6 Colo. 483, a husband was joined as codefendant with his wife. No relief was demanded against him in the complaint. It was held that upon default, there being no answer, judgment should have been rendered against the wife alone. In *Russell v. Shurtleff, supra,* the prayer of the complaint was for a money judgment, in the proportion of the respective interests of the defendants and for general relief. On default, for failure to answer, the judgment rendered was a joint one for the entire sum. This court held that under sec. 186 of the Code, such a judgment was wrong because it exceeded the relief demanded in the complaint, and that a general prayer was not such a demand as the statute contemplates.

In *Ruth v. Smith,* 29 Colo. 154, 68 Pac. 278, it was held error to enter judgment upon default for $86.00 when the amount demanded in the complaint was $60.00. In *Pickett v. Handy*, 9 Colo. App. 357, 48 Pac. 280, there were two defendants, only one of whom answered; judgment was prayed for a certain amount, but interest was not demanded; it was held erroneous to give judgment for the amount prayed for and interest. In *McKenzie v. Peck,* 74 Wis. 208, 42 N. W. 247, the action was for a balance due for work in skidding and hauling logs, for which a statute gave a lien on the logs. The complaint alleged all facts essential to entitle the plaintiff to the statutory lien, but the only relief prayed for was a money judgment. The defendant made no appearance, and, on default, judgment was rendered for the money due, and for a lien upon the logs. The statute provided the same as our sec. 186, that where no answer is filed the relief cannot exceed that demanded in the complaint. The court said:

> "That portion of the judgment which makes the amount thereof a lien upon the logs skidded and hauled by the plaintiff cannot be upheld. No such relief is demanded in the complaint, and no answer

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has been interposed. In such case the statute is imperative that the relief cannot exceed that demanded in the complaint. It is immaterial that the complaint alleges sufficient facts to show the plaintiff entitled to a lien, had he demanded it. In the absence of such a demand, and of an answer, those allegations are inoperative. R. S. sec. 2886. The case of *Zwickey v. Haney,* 63 Wis. 464, [23 N. W. 577] is identical in principle with the present case. See also *Eldeman v. Kidd,* 65 Wis. 25, [26 N. W. 116] and *Morris v. Peck,* 73 Wis. 482, [41 N. W. 623]. But it is unnecessary to cite adjudications on the subject, for the statute is too plain and imperative to admit of any question as to its meaning, or any evasion of its requirements. That it rules a case under the law giving a lien upon logs and timber for labor performed thereon, we cannot doubt."

In *Northern Trust Co. v. Albert Lea College,* 68 Minn. 112, speaking of a like statute, it was said:

"The reason and fairness of this statutory rule, which is practically the old equity rule, is obvious. The defendant by his default submits, without contest on his part, to the court, only the claim of the plaintiff for the relief prayed in the complaint. But if a different or greater relief were demanded, he might appear and contest it as unjust; hence the statute wisely limits the power of the court in awarding judgment by default to that asked for in the complaint, to the end that the defendant may safely omit to appear in cases where he is willing to submit to the court, without contest, the claim of the plaintiff to the specific relief invoked in his complaint."

In *Leland & Co. v. Rose,* 11 La. Ann. Rep. 69, plaintiff petitioned that the defendant, in default of payment of the judgment, be compelled to surrender his property. Upon the filing of the defendant's schedule, the plaintiffs filed charges of fraud, asking that the prayer of the defendant for exemption be rejected, and also for general relief. The district judge refused to imprison the defendant, for the reason that the plaintiffs had in no

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part of their pleadings asked for that remedy, and that the defense could not have been conducted with reference to such a demand. The appellate court held that the district judge was right and said:

> "It is true there is also a prayer for general relief, and in such cases we hold that the party making it are (is) entitled to any and all ordinary decrees or orders which the pleadings and evidence under the pleadings may justify; but this relief does not extend to the extraordinary remedy of the imprisonment of a debtor under a highly penal statute. The presumption is, when a party fails to invoke such a remedy, that he waives it, and the defense is conducted accordingly."

In the case at bar, the district court evidently rejected the plaintiff's demand for exemplary damages in money on account of the fraud alleged, and, in place of this relief which was demanded, substituted the extraordinary relief of imprisonment, which was not demanded at all. In this the court exceeded its authority.

The judgment is affirmed, in so far as the recovery of $825.00 and costs is concerned, and reversed as to the part allowing execution against the body of the defendant, and ordering him imprisoned, and the cause is remanded for such further proceedings as may be in accordance with law, if any can be had.

Judgment affirmed in part and reversed in part.

Decision *en banc.*

Mr. JUSTICE GABBERT, Mr. JUSTICE WHITE and Mr. JUSTICE HILL not participating.

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[No. 7816.]

SAYRE V. LEONARD.

PROMISSORY NOTE—*Parol Condition.* Promissory note delivered upon a parol condition that it shall be without effect in a certain event. The event specified occurs. Under Rev. Stat. § 4479 no action lies thereon by payee against maker. (119)

Error to Gilpin District Court.—Hon. CHARLES MCCALL, Judge.

Mr. L. J. WILLIAMS, for plaintiff in error.

Mr. HARRY E. KELLY and Mr. CHARLES H. HAINES, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

This action was commenced in the county court of Gilpin County, by plaintiff Sayre, against defendant Leonard, on the following promissory note:

"$530. DENVER, COLORADO, Apl. 6, 1910.

Fifteen days after date I promise to pay to the order of Robert H. Sayre Five Hundred Thirty Dollars at the Rocky Mountain National Bank of Central City, Colorado, with interest at six per cent. per year from date until paid.

Value received. (signed) S. E. LEONARD"

No. 15541

Due 21st day of Apl., 1910.

The defendant admits the execution of the note, and that plaintiff had possession of it at the time the suit was begun; but alleges, as a defense, that the note was delivered to the plaintiff conditionally, and was to become binding only upon the happening of a certain possible future event, which did not occur, and that consequently the note never in fact became effective. The con-

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dition which it is claimed was attached to the note was that if one Wingo, a silent owner with Leonard in a certain leasing partnership, in which Sayre also had an interest, should repudiate a transfer of their holdings therein, which Leonard undertook to make to Sayre without consulting Wingo, then the note should become obligatory as representing Leonard's share of the expense of operating the lease, but that if Wingo should ratify and approve the transfer, then the note should be cancelled and returned. It is further alleged that Wingo did in fact ratify and approve the transfer before the note matured; that defendant notified Sayre of that fact; and that the note should thereupon have been returned for cancellation as a void instrument; but that Sayre, in violation of the agreement, thereafter took advantage of his possession of the instrument and brought suit to enforce it. A motion to strike portions of the amended answer, directed against the allegations of conditional delivery, was interposed and overruled. Issue was thereupon joined on that defense. Plaintiff recovered judgment in the county court. Defendant appealed the cause to the district court, where it was tried to a jury, which disagreed, and on stipulation the case was submitted to the court to be decided as though tried before the court without a jury. There the defendant succeeded, and plaintiff brings this writ of error to review the judgment of the district court.

The contention is that the defendant has not pleaded or proved a conditional delivery good in law. The rule of conditional delivery of commercial paper is generally acknowledged. 7 Cyc. 688, and cases cited; *Westman v. Krumweide,* 30 Minn. 313, 15 N. W. 255; *McFarland v. Sikes,* 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111; *Benton v. Martin,* 52 N. Y. 570; *Ewell et al. v. Turney,* 39 Wash. 615, 81 Pac. 1047; *Watkins v. Bowers,* 119 Mass. 383. Moreover, section 16 of the negotiable instrument law, (§ 4479 R. S. 1908) contains a specific provision on conditional delivery in the following language:

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"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

In a recent case decided by this court, *Norman v. McCarthy,* 56 Colo. 290, 138 Pac., page 28, we had under consideration a question closely analagous to the present one, involving the conditional delivery of a check, and upon that proposition, among other things, this was said:

"Now the action on the check in the present instance was between the immediate parties, the payee and drawer, and the further answer alleged that the check was delivered to the payee upon the condition that it was to be paid only in the event that it was determined that the drawer was not entitled to hold the property as against the attachment, which property he kept in his possession. And it was further alleged in effect that the course of events in the attachment suit was such that the drawer was entitled to retain the property, and that the condition upon which the delivery of the check was to become absolute was not fulfilled and could not be. This conditional delivery alleged was certainly within the contemplation of the statute, one which may be shown as between immediate parties, and the further allegations showed that the delivery required by the statute to complete the contract expressed on the

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check was never made, and on that account the check was not a completed contract. The further answer, therefore, was sufficient to constitute a defense."

So here, the action on the note is between the immediate parties, the payee and drawer, and the further answer alleges that the note was delivered upon condition that it was to become effective only if Wingo declined to ratify the transfer of his interest in the leasing partnership, which Leonard had undertaken to make to Sayre. The sole matter then is whether the delivery of the note was attended by a condition which if fulfilled would defeat its enforcement. That the allegations of the further answer, if established by competent proof, constituted a complete defense, such as the statute contemplates, seems certain. Whether the note was so conditionally delivered became purely a question of fact. There was abundant testimony to support the allegations of this defense, and although there was contrary evidence, the specific finding of the court that such was the character of the delivery is controlling upon review.

In the foregoing view of the case it becomes unnecessary to consider the error assigned on the overruling by the county court of the motion to strike portions of the amended answer, if that is properly here. The district court not having passed specifically on such motion, the question raised is whether that assignment may be properly presented on the record before us from that court. This motion went to the vital allegations of conditional delivery, and inasmuch as upon the whole record we hold that a good defense was pleaded and proved, that matter need not be more particularly noticed.

The judgment is affirmed.

CHIEF JUSTICE MUSSER and MR. JUSTICE WHITE concur.

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[No. 7832.]

KEELER v. HOYT.

1. EVIDENCE—*Reports of Supreme Court*, published by the authority and command of the law, are competent evidence of the determinations of that court in a particular cause, where, in another cause, such determination is in issue. (121, 122)

2. ATTORNEY AND CLIENT—*Contracts Between*, are construed most favorably to the interest of the client, and the attorney is held to strict compliance with his undertaking. (122)

3. ——*Contract Construed.* The contract between client and attorney provided that the attorney should be entitled to a certain fee if the supreme court should "uphold the validity of" a certain issue of county bonds. In a cause conducted by the attorney, the same for which he was employed, the validity of the bonds was affirmed by the supreme court, against all objections thereto made in that litigation. The fact that other objections were afterwards raised by the client, constitutes no defense to an action for the attorney's fee; nor does the raising of objections by others, no attempt being made to show the facts upon which these objections were founded. (123)

4. EVIDENCE—*Witness—Competency.* The defendant is not a competent witness in his own behalf as to facts occurring before death where the plaintiff sues as executrix. (123)

Error to Denver District Court.—Hon. GEORGE W. ALLEN, Judge.

Mr. ARTHUR PONSFORD and Mr. CHAS. F. CARNINE, for plaintiff in error.

No appearance for defendant in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

Lucius W. Hoyt, an attorney at law, entered into a contract with the plaintiff in error, wherein Mr. Hoyt agreed to act as attorney in a suit, about to be instituted,

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to test the validity of an issue of $350,000 of Pueblo County Refunding Bonds, theretofore authorized at an election in that county, and as stated in the contract, "only in the event that the supreme court upholds the validity of said bonds, then in consideration of said services of said Hoyt, said Keeler agrees to pay said Hoyt the sum of One Thousand Dollars ($1,000.00), provided further; if said Keeler sells said bonds on a 4.20% basis, or better, then said Hoyt is to receive from said Keeler an additional $250.00 or $1,250.00 in all; further provided if said Keeler sells said bonds on a 4⅛% basis or better, then said Hoyt is to receive from said Keeler an additional $250.00 or $1,500.00 in all; it being first understood that if Pueblo County at any time after November 2, 1909, cancels the sale of said bonds to said Keeler, before a decision is rendered by the said supreme court, then said Hoyt is to receive nothing except costs disbursed and expenses."

After Mr. Hoyt's death, the executrix brought an action against the plaintiff in error to recover for the services rendered by Mr. Hoyt under the contract, and obtained a judgment for $1,190.00, which was the $1,000.00 provided for and the accumulated interest. But two questions are discussed in the brief.

1. For the purpose of proving the result in the supreme court in the suit mentioned in the contract, there was offered and admitted as testimony for the executrix the reported decision of the case of *Manly v. The Board of County Commissioners of Pueblo County,* reported in Vol. 46 of the Colo. Rep., p. 491, which was the suit referred to in the contract as about to be instituted. This was objected to on the ground that it was not the proper way to prove the action of this court. It is claimed that the record of the court, or a certified copy thereof, should have been introduced. The reports of the supreme court of this state are published, by the authority and at the command of law, as the official opinions of the court. As the contract specified that the attorney should receive

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pay for his services, only in the event that the supreme court upheld the validity of the bonds, there was no better proof of what that court did hold than the reported official opinion published as commanded by law. Some comment is made that there was a failure to show anything with reference to the proceedings in the district court more than that the suit was brought from the district court to the supreme court. It was admitted that Mr. Hoyt acted as attorney in the district court. There was no charge made in the answer or anywhere else that the attorney neglected his duty or in any manner failed to carry out his contract as to the case in the district court. In the absence of any such neglect or dereliction, on the part of the attorney, it was immaterial what disposition was made of the case in the district court for the fee was to be paid only in the event that the supreme court upheld the validity of the bonds. The very fact that it reached the supreme court and was determined there is proof that it was instituted and prosecuted to final judgment in the district court, and that was ample, inasmuch as no claim was made that the attorney neglected the case or was guilty of wrong or failure in any way.

2. It is next claimed that the evidence failed to show that Mr. Hoyt had complied with the contract. The opinion in the 46 Colo. states that three objections were raised in this court as to the validity of the bonds, and, after a discussion of those objections, it was held that each of them was untenable, and the judgment of the district court, which had refused to enjoin the issuance of the bonds, was affirmed. It is claimed that holding bonds valid against three objections does not uphold their validity as against other objections which might have been raised, and which this court did not dispose of. It is true that an attorney should be held to a strict compliance with any contract of employment he may make with a client, and that such a contract should be construed most favorably to the interests of the client as stated in the authorities cited in the brief. But to hold in this case that the contract was not complied with would be carrying

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the rule beyond the limit of reason and beyond any of the cases cited. There is no bad faith, neglect, wrong or dereliction, on the part of the attorney, or of anyone connected with the suit, charged or claimed. It is not charged or claimed that any other objections could have been raised against the bond issue than were raised, in view of the facts present in the case. It is not to be presumed that an attorney would raise an objection that in the light of the facts would be wholly and plainly untenable or frivolous, or that, through neglect, bad faith, or incompetence, he would fail to raise one that was worthy of being raised. So that when the case was presented to and determined by this court, as it was, the reported opinion in the case was at least *prima facie* evidence, if not more, that the supreme court had upheld the validity of the bonds.

To rebut this *prima facie* case, all that was attempted was to show, by the plaintiff in error, that the latter had himself, after the decision in this court, raised certain objections to the bonds that had not been passed upon. That was clearly incompetent. The record is not quite clear, but it may be that there was an attempt to show that someone else had raised some of these objections also. This was incompetent. Objections could have been easily raised by anyone. The raising of objections would not prove the invalidity of the bonds, nor that this court had not upheld their validity. A party to such a contract can not defeat it in such a self-serving way as raising objections, and claiming that these objections had not been passed upon by the court. As we read the record, it was only attempted to show that the objections had been raised by the plaintiff in error and perhaps by some other person, and it was not attempted to show that the facts existed upon which the objections were supposed to be based. If it be claimed that this is what was attempted, the answer is, that because those facts occurred and existed before the death of Mr. Hoyt, the plaintiff in error, by reason of the statute, was not a competent witness to prove them, for he was the defendant in the case brought

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against him by the executrix. The action mentioned in the contract as about to be instituted was brought by Mr. Manly to restrain the county commissioners from issuing the bonds. Mr. Hoyt represented the defendants. He was employed for that purpose. He did the work he was employed to do. He defended the bond issue against the assaults made upon it, and the validity of the bonds was upheld in this court. No charge was made, nor proof offered that there were any reasons kept from the court which would have made the bonds invalid or even render their validity questionable. Under these circumstances, we think the judgment should be affirmed, and it is so ordered.

Judgment affirmed.

Mr. JUSTICE GABBERT and Mr. JUSTICE HILL concur.

[No. 7859.]

FIRST NATIONAL BANK OF ROCKY FORD v. LEWIS.

1. PLEADING—*Counterclaim*, as used in § 63 of the Revised Code, is a broader term than set-off or recoupment, and includes both of them. (126)

The State Bank assigned to the plaintiff, after maturity, a promissory note of defendant. The bank was then insolvent, and on the following day closed its doors. Defendant, at the time, had on deposit in the bank a sum in excess of the amount due upon his note. *Held* that in an action by the plaintiff upon the note defendant was entitled to set off the amount of the note.

The common law rule that the indorsee of an overdue promissory note takes it exempt of all equities which do not attach to or inhere in the note itself, at the time of the transfer, is so modified by the code that all equities existing between the maker and payee, at the time of the assignment, or notice thereof, avail to the maker, in an action by the assignee. (128, 129)

2. DEMAND—*When Necessary.* The account of a depositor in an insolvent bank is due without demand. (130)

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3. PROMISSORY NOTE—*Payable Without Defalcation.* The words are mere surplusage; they have not the effect to waive set-offs. (131)

4. NEW TRIAL—*Motion—Assignment of Grounds.* All errors relied upon as ground of a motion for a new trial should be specifically set forth. Any error not so presented should be regarded as waived (130)

Error to Otero District Court.—Hon. J. E. RIZER, Judge.

Messrs. ADAMS & GAST, for plaintiff in error.

Mr. J. H. VOORHEES, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

The defendant in error Lewis executed and delivered his promissory note for $1,500.00 to the State Bank of Rocky Ford, which was assigned after maturity to the First National Bank of Rocky Ford, plaintiff in error, who later brought suit upon it against Lewis to recover judgment for the amount then due.

The circumstances surrounding the controversy are in the main as follows. The State Bank of Rocky Ford, being indebted to the First National Bank of that city in the sum of $1,051.45, balance on exchange, gave the latter a draft for the amount on a Pueblo bank, which draft was dishonored and returned unpaid to the First National Bank of Rocky Ford. Upon demand, on December 30th, 1907, the State Bank, being unable to pay the draft, asked for further time, and turned over the Lewis note as collateral security for the debt. The record shows that the State Bank, on the day the Lewis note was turned over to the First National Bank of Rocky Ford, had committed an act of insolvency through failure to pay and discharge its draft; that it was actually then insolvent, and closed finally on the next day; that on the second day thereafter it was placed in the hands of the State Bank Commissioner and subsequently a receiver was ap-

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pointed. At that time Lewis had on deposit in the bank a sum in excess of the amount due on his note, and this he pleaded in set-off. The note was drawn with the payee blank, and when it came into the hands of the plaintiff in error its name was inserted as payee for purposes of suit. Upon trial to the court judgment was rendered in favor of defendant, which the bank brings here for review.

The main question presented is, was the set-off properly allowed? Section 62 of the Code of Civil Procedure, R. S. 1908, provides, among other things, that, secondly, the answer shall contain a statement of any new matter constituting a defense, or counterclaim. Section 63 thereof reads:

> "The counter-claim mentioned in the last section, shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:
>
> "First.—A cause of action arising out of the transaction set forth in the complaint or answer, as the foundation of the plaintiff's claim or defendant's defense, or connected with the subject of the action.
>
> "Second.—In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action."

Sections 3 and 4 provide:

> "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act."
>
> "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due."

Counterclaim, as used in section 63, *supra,* is a broader term than either set-off or recoupment, and includes both of them.—25 Ency. Law, page 570; *St. Louis National Bank v. Gay,* 101 Cal. 286, 35 Pac. 876. This sec-

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tion expressly and explicitly gives the right to interpose this set-off against the original payee, and section 4, *supra,* preserves it for application in defense of just such an action as the one now before us, namely, a suit upon a promissory note by an assignee, taking it after due. This holding is not only made possible but irresistible, when it is concluded, as has been often declared in code states, that set-off is embraced in the term counterclaim. New York, California, Nebraska, North Carolina and other states have construed substantially these same provisions. In *St. Louis National Bank v. Gay, supra,* under similar facts, the court said:

> "'Counterclaim,' as used in our code, includes both recoupment and set-off, and is, strictly speaking, a pleading by which matters arising out of recoupment or set-off are averred. It may be used by defendant to plead as against the plaintiff: '1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the cause of action; 2. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.' (Code Civ. Proc., sec. 438.)"

Set-off was allowed under facts similar to those here presented in *Cole v. Stearns,* 20 Misc. Rep. 502, 46 N. Y. Supp. 238. The conflict between California and New York concerning these sections, as noted in section 166 of Pomeroy's Code Remedies, has to do with the time set-off accrues under their respective provisions. They are in harmony upon the proposition under consideration. In *Harris v. Burwell and Parham,* 65 N. Car. 584, the court, commenting on a provision like section 4 of our code, said:

> "The language is as broad as it can well be; so that a note assigned after it is due, a half dozen times, will be subject to any set-off or other defence that the maker had against any one or all of the assignees at the date of assignment, or before notice thereof."

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In *Edney v. Willis,* 23 Neb. 56, 36 N. W. 300, a like conclusion was announced:

> "Section 31 of the code provides that, 'In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense now allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration, before due.' This clearly implies that set-off may be allowed against a note transferred after due."

In *LaDue v. First National Bank of Kasson,* 31 Minn. 33, 16 N. W. 426, construing a statute upon the subject of set-off, the court said:

> "The effect of this statute, clearly, is to place an overdue bill or note on the same footing as any other chose in action, and, if it be assigned after due, a set-off to the amount of the note or draft may be made of any demand existing against any person who has assigned or transferred such note or bill after it became due, if the demand is such as might have been set-off against the assignor while the note or bill belonged to him. A set-off arising out of an independent transaction against an intermediate holder is thus placed upon the same footing as an equity attaching to the bill or note itself against the original payee."

The note in suit was assigned by the payee after maturity, and was thus shorn of immunity from all defenses which might have been urged against it before assignment, or notice thereof, by the maker while yet in the hands of the payee, including that of set-off allowed by the code. While the note still retained its negotiable character, yet it was subject, under the facts of the case, to any defense which would have been available had it been nothing more than a simple contract, or chose in action, transferred by assignment. Under the code provision, which allows as set-off against an action on contract any other cause of action also arising on contract, it seems clear that in an action on the note in question by the payee, the State Bank of Rocky Ford, the maker

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could plead as set-off the amount he had on deposit with that bank. This being so, since the present holder of the note acquired it after maturity he held it subject to every defense which the maker might have against a suit on it by the payee, and the set-off was therefore properly allowed. As a general rule a purchaser of overdue paper of this sort is put on inquiry, its non-payment being a suspicious circumstance. These further authorities support this conclusion: *Oldham v. Wallace,* 4 Ark. 559; *Gatewood v. Denton,* 3 Head (Tenn.) 381; *Bull v. First National Bank of Kasson,* (C. C.) 14 Fed. 612; Pomeroy's Code Remedies, sec. 163; and 34 Cyc., pp. 749-750.

Counsel for plaintiff in error contend that the code provisions being remedial rather than substantive, the question presented must be resolved by application to it of common law principles. It is sufficient to say that nowhere, so far as we are advised, have code provisions such as are now before us been so construed, and no authority is cited to support the contention. The code is a special enactment of the legislature, and we see no valid reason for saying that an affirmative right definitely declared and given by it is meaningless and not substantive.

The case of *Cooper v. Bank,* 9 Colo. App. 169, 47 Pac. 1041, is cited by plaintiff in error to support its contention on this branch of the case. That decision is in no sense authority upon the question here determined. There the defense interposed was an oral contract made at the time of or prior to the making of the note, the effect of which was to impeach, invalidate and destroy the note, and did not constitute a set-off. That case is clearly distinguishable from this one on the facts. Moreover, the opinion therein follows a common law rule and was apparently announced without the court's attention having been directed to the code provisions now under consideration.

The right to the set-off here interposed rests upon our code provisions. The common law rule, that the indorsee of an overdue promissory note takes it exempt from all equities which do not attach to or inhere in the

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note itself at the time of assignment, which has been correctly stated by counsel for plaintiff in error in their brief, has no application, as with us this rule has been so modified by the code that the note in question, which was assigned when overdue, is, in a suit upon it by the assignee against the maker thereof, subject to all the equities which existed between the maker and the payee at the time of assignment or notice thereof.

Section 58 of our negotiable instrument law provides that "In the hands of any other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable." One of the essentials to constitute a holder in due course is that the instrument must have been acquired before maturity. It is, however, unnecessary for the purposes of this decision to determine whether the word "defenses," as used in section 58, has such broad significance as to include all equities and defenses however arising, or is limited to those which inhere in and grow out of the note itself, as at common law, since in any event the code provisions plainly give a right of set-off under the facts of this case.

The suggestion that the deposit account of the defendant was in no event available as a set-off, because not due, no demand for payment thereof having been made, seems not to be properly here for consideration. A motion for a new trial was interposed, and while that was not indispensable, as the case was tried to the court, since such motion was made all errors relied upon should have been specifically set forth in it, so as to give the trial court full opportunity to know the precise reasons which them after full hearing. It is but fair to the trial court that, on review, it should be assumed and held that any alleged error not so presented was waived. Such at least ought in logic and reason to be the rule. The overruling of the objection interposed to the introduction of evidence of the bank's indebtedness to the defendant was not alleged in the motion. Moreover, we think there is no as-

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signment of error here under which this objection can fairly be urged or considered.

In any event, the contention is without merit, for clearly the State Bank was, upon the record before us, insolvent when it transferred the note in question, and for this reason the account of Lewis was due without demand, and he was therefore then entitled to urge, as a set-off to his note, this claim against the bank.—*Zane on Banking,* sec. 144; *Merchants' Exchange Bank v. Fuldner,* 92 Wis. 415, 66 N. W. 691; *Scott v. Armstrong,* 146 U. S. 499, 36 L. Ed. 1059, 13 Sup. Ct. 148.

The plaintiff's remaining contention, that because of the presence in the note of the expression "without defalcation" all rights of set-off are waived, cannot be upheld, as these words are nothing more than a relic of pronounced antiquity in the law, a mere remnant of common law forms, and wholly without meaning in the light of modern usage, under the practically uniform provisions of the negotiable instrument law now in force in this and many other states. A negotiable promissory note is defined by that law to be an unconditional promise or order in writing and signed by the maker or drawer, to pay a certain sum of money to order or bearer on demand or at a fixed or determinable future time. While the words "without defalcation" may have had a use and meaning in the negotiation of written instruments in some distant past, they are now no more than mere surplusage. Our negotiable instrument act stamps an instrument negotiable or non-negotiable according as it conforms or fails to conform to the requirements of that act. It must be a written instrument which provides for the unconditional payment of a fixed sum on demand or at a fixed or determinable future time. The words "without defalcation" add nothing whatever to the force and effect of such an instrument, either before or after maturity.

The judgment is in all respects right, and is accordingly affirmed.

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CHIEF JUSTICE MUSSER and Mr. JUSTICE WHITE, concur.

[No. 7914.]

ROGERS v. ROGERS.

1. DIVORCE—*Complaint.* The wife's complaint for divorce alleged that she was living apart from her husband, and, besides other wrongs and neglect, that on various occasions, the husband, without cause or excuse, had left her, and absented himself from the state for months, making no provision for the support of his family, and that plaintiff had been compelled to earn money by her own labor, for the support of herself and their child. *Held* to sufficiently show that the wife was justified in living separate and apart from the husband. (132)

Under Rev. Stat. § 2112 the wife's complaint may allege non-support by the husband, he being in good bodily health, "for more than one year", even though this may require the husband to justify or excuse his conduct for any number of years. (132)

2. PLEADING—*Supplemental.* A supplemental cross complaint filed without leave may be stricken from the files. (134)

3. ——*Amendment—Supplemental Pleading.* The amendment of a pleading rests in the discretion of the trial court, and its action will not be reviewed unless an abuse of the discretion appears.

An application for leave to file a supplemental cross complaint, not supported by affidavit is properly refused. (Code § 80.) (135)

4. CONTINUANCE—*Diligence Required.* The action of the trial court in denying an application for a continuance will not be reviewed unless an abuse of discretion is shown.

The application, grounded upon the absence of a witness, was filed upon the day appointed for trial. The cause had then been at issue for more than four months. The affidavit in support of the motion stated that defendant had for two weeks been endeavoring to ascertain the whereabouts of the witness, but failed to state what he had done in or towards this inquiry; and gave no excuse for the failure to institute the search at an earlier date. It averred that plaintiff had received a letter, stating that the witness was at one of three places named, but defendant failed to produce the letter, excuse its non-production, or give the name of the writer. *Held* that there was no abuse of discretion in denying the application. (135, 136)

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5. BILL OF EXCEPTIONS—*When Necessary.* Where the evidence is not presented the refusal of an instruction will not be considered. (136)

6. INSTRUCTION.—*Objections To,* not presented at the time the change is given cannot be assigned for error. (136)

Error to Denver District Court.—Hon. GEO. W. ALLEN, Judge.

Mr. WALTER M. DUFF, for plaintiff in error.

Mr. PERRY D. ROSE, for defendant in error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Action for divorce. Verdict and decree for plaintiff. Defendant brings the case here for review on error, and assigns the following in support of his contention that the judgment of the district court should be reversed: (1) That the complaint does not state facts sufficient to constitute a cause of action. (2) The refusal of the court to grant his motion to strike from the complaint. (3) Striking his supplemental cross-complaint from the files. (4) Refusal to grant his motion to refile the supplemental cross-complaint. (5) Refusal to grant his motion for a continuance. (6) Refusal to give the jury an instruction offered by him. (7) Error in instructions given.

(1) The ground for divorce alleged in the complaint was the failure of the defendant to make reasonable provision for the support of plaintiff and their minor child. She alleged that she and her husband were living apart, and it is contended that it was incumbent upon her to have alleged the cause of separation in order to show that she was justified in living apart from her husband and entitled to his support. She alleged that on account of the failure of the defendant to make reasonable provision for the support of herself and their

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minor child she had been compelled to work as a milliner, and to perform at times manual labor other than her household duties, in order to support herself and child, and that on various occasions defendant had left her without just cause or excuse, and absented himself from the state for periods of nine or ten months at a time, without making any provision for the support of his family during his absence. Clearly she was justified in living separate and apart from her husband when this course was necessary in order to earn money with which to provide the support which it was the duty of the defendant to make provision for.

(2) In her complaint the plaintiff charged that defendant, being an able bodied man in good health, had failed and refused to make any reasonable provision for the support of plaintiff and their child, for more than one year next preceding the beginning of this action. The defendant moved to strike from the complaint the words, 'more than';—which was denied. It is contended that this motion should have been sustained because by the words, 'more than one year,' the defendant would be compelled to plead to and defend against any number of years. One of the grounds of divorce specified in the statute is the failure of the husband, being in good bodily health, to make reasonable provision for the support of his family for the space of one year. In support of this ground the plaintiff may show that the period of non-support which will entitle her to a divorce is greater than that specified in the statute, and it is not error to so plead.

(3) It appears that defendant's supplemental cross-complaint was filed *ex parte* and it was not error for the court to sustain the motion to strike it from the files in these circumstances.

(4) In his original answer and cross-complaint the defendant denied that he had failed to support his family and alleged that plaintiff had willfully deserted and absented herself from him without reasonable cause for the period of one year next preceding the date of filing this

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pleading,—which was filed November 21, 1911. December 11th, following, the plaintiff filed her replication and answer to the cross-complaint. January 12, 1912, defendant requested leave to refile his supplemental and amended cross-complaint which, among other averments, charged that the plaintiff had been guilty of adultery. The cause was commenced May 24, 1911. It was at issue for more than two months prior to the date defendant requested leave to amend his pleadings by refiling his supplemental cross-complaint. The Code provides that the court may, upon affidavit showing good cause therefor after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading. The refusal of the court to permit an amendment to a pleading rests in its sound discretion and will not be reversed except it appears that such discretion has been abused. In this case no affidavit was filed setting forth any reasons why the defendant should be permitted to refile his cross-complaint at the time it was tendered. The showing merely consists of an unverified statement signed by counsel for defendant to the effect that defendant did not have the evidence sufficient to sustain the charges of adultery as set forth therein at the time he filed his original answer. On such a showing it can not be said the court abused its discretion in refusing defendant leave to refile his cross-complaint.

(5) March 13, 1912 the defendant interposed a motion for a continuance on account of the absence of a witness. Large discretion is vested in trial courts with reference to a continuance, and unless it is shown that such discretion was abused it will not be reversed. The showing in support of such a motion must be upon affidavit from which it appears that the moving party has used due diligence to procure the attendance of the witness whose testimony it is claimed is material. From the record it appears that the case was set for trial on the date the motion for a continuance was interposed. The affidavit of defendant stated that he had been endeavoring to ascertain the whereabouts of the witness for two

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weeks previous to the date the application was made. No excuse is offered why he did not attempt to learn this previous to the time he says he did commence efforts for this purpose. He deposes that he had a letter from a person whom he had employed to locate the witness, wherein it was stated that she was either in Loveland, Ft. Collins or Greeley, but does not produce the letter nor offer any excuse for its non-production. He does not disclose the name of the person he employed, nor offer his affidavit stating the steps he had taken to ascertain the whereabouts of the witness. In these circumstances we think the court did not abuse its discretion in refusing his application for a continuance.

(6) The defendant requested an instruction to the effect that plaintiff admitted she had absented herself from her husband for more than one year; that such absence would not be justified except for reasonable cause, and that if it appeared that at the time she left the defendant he was making reasonable provision for the support of his family, consistent with his means and ability, then her absence from defendant was not with reasonable cause:—which was refused. Presumptively this instruction is based upon the averments of the cross-complaint to the effect that plaintiff had deserted the defendant. The testimony is not before us, not having been preserved by a bill of exceptions. It was not error to refuse the instruction unless there was testimony to support the theory upon which it was based. In the absence of the testimony we must assume that the action of the court in refusing the instruction was proper.

(7) The objections urged to the instructions given are to the effect that the court did not explain the words, 'reasonable cause' and what 'constituted desertion.' Defendant did not object to the instructions at the time they were given. Neither did he request to have the expressions in the instructions to which he refers defined.

The judgment of the district court is affirmed.

Judgment affirmed.

Decision *en banc.*

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[No. 8092.]

HARRISON v. THE PEOPLE.

1. CONSTITUTIONAL LAW—*Amendment of the Constitution—Judicial Notice.* The facts upon which depend the question whether an amendment proposed to the constitution has received the approval of the people will be judicially noticed. (143)

2. EVIDENCE—*Judicial Notice*, is taken of the facts upon which depends the question as to the adoption by the people of a proposed amendment to the constitution. And the court will resort to all sources of information which may afford satisfactory evidence upon the question. (143, 144)

The published volumes of the general statutes of 1883, and Mills Statutes, accepted as prima facie evidence of the constitution, as therein appearing, nothwithstanding the manifest defects in the certificate of the secretary of state, prefixed to the first, and in spite of the note to § 29 of art. VI found in the second.

The court having received information from the county clerks of many of the counties, that, as shown by the records and memorials contained in their respective offices, the amendment proposed by c. XVII of Gen. Laws 1877, to § 29 of art. VI, was in fact submitted to the people at the succeeding general election, and being convinced beyond doubt from these sources of information, and the recognition of the amendment in the early decisions of this court, when the matter must have been of common knowledge (5 Colo. 455, 457; id 487, 490; 6 Colo. 92, 93; 11 Colo. 373, 376) that in fact the amendment so proposed received the popular sanction, declared it to be part of the fundamental law, though no evidence whatever of its submission or adoption was found in the office of the secretary of state. (142, 143)

3. ——*Stipulation of the Parties as to the Law*, that a supposed enactment is invalid, or their agreement as to facts which render it so, will not be accepted. (144)

4. ——*Official Certificate.* The certificate of the secretary of state to the published volume of the Revised Statutes is not affected by the statement contained in the note at the foot of § 29 of art. VI of the constitution. The extent of his official duty was to place the constitution in the volume, and it was not within his function to cast doubt upon his own work. (143)

5. STATUTE—*Evidence of Enactment—Burden of Proof.* The court has invariably noticed the documents evidencing action of the general assembly, subscribed by the proper officials, and found in the office of the secretary of state. They are accepted as *prima facie* evidence of

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the law, and whoever asserts the contrary has the burden of proof. (145)

Error to Lake District Court.—Hon. CHAS. CAVENDER, Judge.

Mr. JOHN A. EWING and MR. FRAZIER ARNOLD, for plaintiff in error.

Mr. JOS. W. CLARKE, for defendant in error, Allan.

Mr. JUSTICE WHITE delivered the opinion of the court:

The question involved in this suit is, whether William H. Harrison or John P. Allan is entitled to the office of Judge of the county court of Lake County. The suit was instituted in the district court upon the relation of the district attorney against Harrison and Allan, each of whom claimed to be entitled to the office. The judgment was in favor of Allan and Harrison brings the cause here for review.

At the general election in November, 1908, Harrison was elected to the office for the four year term commencing January 12, 1909, and thereafter, in due time, qualified and entered upon the discharge of the duties thereof, and so continued until the judgment of ouster here under review. At the general election in November, 1912, one Duncan J. McLean was elected to the office for the four year term, commencing January 14, 1913. He, however, died on January 2d without having filed a bond or taken the oath of office. When the term for which he was elected arrived the board of county commissioners, by resolution, declared a vacancy to exist and appointed John P. Allan to fill the same, who thereupon qualified and demanded the office.

It is claimed by Harrison that (original) section 29 of article VI of the constitution as adopted in 1876 is now in force, and by virtue thereof the vacancy in the un-

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expired term, occasioned by reason of McLean's failure to qualify, could be filled only by an election; and, being the incumbent of the office, he was entitled to hold over under the provisions of § 1, Art. XII of the constitution. Allan contends that § 29 of art. VI of the constitution. as adopted in 1876, was amended at the general election in 1878, as proposed by chap. 17 of the General Laws of 1877, p. 132, and is, as that section now appears, in the body of the constitution, in General Laws, 1883, Mills Ann. Stat. 1891, Rev. Stat. 1908, and Mills Ann Stat. 1912.

It is conceded that if the proposed amendment is, in fact, a part of the constitution, the judgment in favor of Allan is right; otherwise, it is wrong. The amendment was proposed under the provisions of § 2 of art. XIX of the constitution as adopted in 1876. The section required the secretary of state to publish the amendment in full in at least one newspaper in each county, (if such there be), for three months previous to the next general election for members to the general assembly. It also declared that "at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection, and such as are approved by a majority of those voting thereon, shall become part of this constitution." The constitution was silent as to the procedure in submitting proposed amendments to a vote of the qualified electors, and ascertaining the result of such vote. The act proposing the amendment, however, made provision therefor. Section 2 required the elector to deposit in the ballot box a ticket whereon should be written or printed "For the amendment" or the words "Against the amendment." And § 3 declared that the votes cast for the adoption or rejection of the amendment should "be canvassed and the result determined in the manner provided by the laws of the state, for the canvass of votes for representatives in congress." At that time the mode of procedure in that regard was prescribed by chap. 30

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of the General Laws of 1877. From a consideration of these provisions it is disclosed that an abstract of the votes cast, and the result thereof, in each county was required to be made, filed and recorded in a book kept for that purpose in the office of such county clerk, and a certified copy delivered or transmitted to the office of the secretary of state of the state board of canvassers, —§§ 53, 54, 56, chap. 30, Gen. Laws 1877; that from such certified copies of the abstracts of votes cast in the different counties the state board of canvassers were required to ascertain and determine the result of the election, and make statement thereof, and of the whole number of votes cast at such election, on the proposition in question, and to certify and deliver the same to the secretary of state, who was required to record it in a book kept for that purpose, and to cause a copy of the certified statement to be published in a newspaper published at the seat of government. §§ 60 and 62, chap. 30, Gen. Laws 1877.

Harrison relied upon original section 29 of art. VI of the constitution, and a legislative resolution—S. L. 1887, p. 476—wherein the secretary of state was directed to publish with the laws enacted that session all amendments to the constitution adopted since the original constitution; and though certain constitutional amendments are therewith published, the amendment in question is not, and no reference is made thereto. S. L. 1887, pp. 481, 484. He also introduced in evidence a certificate of the secretary of state, dated the 6th day of February, 1913, showing that the act of the general assembly proposing the constitutional amendment in question was on file in the records of his office; and that, after a careful research of the records of that department, he failed to find therein any record of the submission of the amendment to a vote of the people; or any record that the several county clerks certified abstracts of the votes cast thereon in their respective counties; or that the same was canvassed or a certificate of determination thereon issued by the state board of canvassers. By declaration of

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S. L. 1911, p. 231, this certificate established, *prima facie,* the non-existence of any facts certified to as not existing in the records of such department which were, by law, required to be kept or recorded in that department.

By an act of the general assembly, approved Feb. 28, 1883, pp. 5-7, G. L. 1883, provision was made for the printing, *inter alia,* of the constitution, together with all the general laws of the state, and the secretary of state required to certify "to the correctness of said laws and other matters so printed;" and the act declared that the laws and other matters so printed and certified shall be *prima facie* evidence of the original in all courts and tribunals of this state. In the constitution so printed, § 29, art. VI appears as amended, followed by a reference to the legislative act proposing the amendment. However, the certificate of the secretary of state to the volume published, Gen. Stat. 1883, though reciting the title of the act authorizing the compilation, and certification thereto, and making the laws and matters so certified *prima facie* evidence of the original, does not include the constitution, but extends only to the general laws of the state and the code of civil procedure. An act of the general assembly, S. L. 1907, p. 93, provided for the compilation, publication, and distribution, *inter alia,* of the constitution, and all the general statutes of the State of Colorado, including the code of civil procedure, in one volume. The act also required the secretary of state to copyright the publication, and prepare a certificate to the effect "that the volume contains all the general laws of the State, the Constitution of the State of Colorado, and the Code of Civil Procedure, that he has carefully compared the same with the original manuscripts, and that the compilation and revision is complete, true and correct," and declared that the laws and other matters so printed and certified should be *prima facie* evidence of the originals, in all courts and tribunals of this state. In the body of the constitution therein printed the section, as amended, appears, followed, however, by a note in small type, that while there is no record of a vote on this

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amendment, it is supposed to have been adopted October 1, 1878, together with a recitation of the original section.

It is conceded that the certificate of the secretary of state to this volume, taken alone, covers the section as amended and makes it, *prima facie,* a part of the constitution, but it is insisted that the certificate must be read and considered in connection with the explanation contained in the note, and, when so considered, its effect in that regard, is destroyed thereby; and that this coupled with the failure of a previous secretary of state to embody the alleged constitutional amendment in the Session Laws of 1887, when obeying the legislative mandate to embody therein all amendments to the constitution adopted since the original constitution, removes any presumption as to its validity that might otherwise maintain. In the body of the constitution, as printed in Mills Ann. Stat. 1891, and Mills Ann. Stat. 1912, appears the section as amended, followed by the same note appearing, as hereinbefore stated, after the section in the Rev. Stat. 1908. By legislative enactments, these editions, by name, were made *prima facie* evidence of the originals, in all courts and proceedings in this state. S. L. 1891, p. 367, as to the former edition, and S. L. 1913, p. 406, as to the latter edition. The claim is made, however, that the effect of these legislative enactments, making the contents of such books *prima facie* evidence, extends no further than the statutory law of the state, notwithstanding there is embodied therein that which purports to be the Constitution, including the amendment in question.

We do not concur in these views. The volumes of Mills Annotated Statutes are designated by name and those volumes, whatever they contain, are declared to be *prima facie* evidence of the originals. Moreover, while the certificate of the secretary of state, to the General Statutes of 1883, is unquestionably defective, the publication of the volumes was, nevertheless, authorized by legislative authority, and the Constitution of the state directed to be published therein; so the instrument found therein

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as the Constitution, may be accepted, *prima facie,* by the courts as such instrument, notwithstanding the defective certificate. Nor do we think that the note following the section of the Constitution here in question, as the same appears in the body of that instrument as found in R. S. 1908, in any wise affects the *prima facie* character to be ascribed to that amendment by virtue of the certificate of the secretary of state. As a public official he was commanded, *inter alia,* to place the Constitution in that volume and to certify thereto. This was the extent of his official duty in the premises. It devolved upon him to do this act, and the effect thereof is not destroyed because he set forth in a note certain matters that might cast some doubt upon the correctness of his conclusions. However, should we be mistaken in these views, it would not require a reversal of this judgment. The facts here involved are facts of "law", and may be noticed judicially, to the end that we be satisfied what the law is that we are called upon to apply. As said in *Nesbit v. The People,* 19 Colo. 441, 450, 36 Pac. 221, 224:

> "Every court must determine for itself what the law is upon a given subject, whenever it becomes necessary to apply the same in the discharge of its judicial functions. It is a matter of every day experience that the court must decide what the common law is, and what the construction of statutes shall be; so, also, the court must decide as to the existence or validity of a statute, whenever the same is in dispute; and, as a general rule, the same principle applies to a dispute respecting the existence or non-existence of constitutional provisions. Such dispute may become a question of fact, yet the court must determine it, and, in doing so, may resort to other evidences than the session laws of the state published by authority. It may seem paradoxical, but it is nevertheless true, that a question of fact respecting the existence or non-existence of a law is a question of law; it is a question to be determined by the court whenever it arises in the course of litigation, and not a question to referred to some other tribunal for de

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cision. *Town of Ottawa v. Perkins,* 94 U. S. 260. [24 L. Ed. 154.]

Indeed, we will not accept the admission of parties that a supposed law is invalid, or their agreement as to the existence or non-existence of facts rendering it so.—*Peckham v. People,* 32 Colo. 140, 75 Pac. 422; *Anderson v. Grand Val. Irr. Dist. Co.,* 35 Colo. 525, 85 Pac. 313.

Whenever it becomes necessary to apply the law in the discharge of our judicial functions, *we must know what it is,* and to that end may resort to that which is proper and essential to satisfy our minds in that regard. As said in Wigmore on Evidence, § 2572: "A court may be expected to dispense with evidence of the law of its own sovereignty; for it must be credited with a knowledge of it, or at least with the most competent knowledge where to search for it. No evidence of it need therefore be offered; and the counsel's reference during a trial to the text, or a copy, of the statute, for informing the judge, must be regarded as a judicial license to counsel to employ that evidence which the judge (*ante,* § 2569) would in theory seek for himself."

Mr. Justice Miller tersely states the rule in *Gardner v. The Collector,* 6 Wall. 499, 511, as follows: "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

That we may forego our own investigation and accept a certificate of some officer as sufficient proof of facts to be judicially determined, is well established. As said in Wigmore on Evidence, § 1353: "That a court may do this, when it believes the result to be a more likely approach to truth than its own investigations could obtain, cannot be doubted. But in such a case the court

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acts voluntarily, and exercises its choice. Being charged constitutionally with the exclusive function of determining facts in controversy, it believes this duty to be best carried out by accepting a certain person's statement as the most satisfactory source of reliance in reaching that determination." And further in the same section: "It is one thing for the judiciary, while exercising in its own way its constitutional powers, to choose to accept the aid of an official certificate in reaching its determination; but it is quite a different thing for the judiciary to be forbidden altogether to exercise its powers in a certain class of cases. The judicial function under the Constitution is to apply the law; to apply the law necessarily involves the determination of the facts; and to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function."

This rule has long been recognized in the courts of this jurisdiction by declining to examine, *sua sponte,* the journals of the general assembly on the mere assertion of counsel that an enrolled bill, which has been duly certified and signed by the proper officers and deposited with the secretary of state, is invalid because of non-compliance with some requirements in its passage, but requiring the party seeking to question its validity to present the facts upon which he relies to the trial court, and if he desires to have the decision of that court reviewed, to make such proof a part of the record by bill of exceptions. In other words, we have invariably taken judicial notice of all the acts of the general assembly, signed by the proper officials, and found in the office of the secretary of state, because they are, *prima facie,* the law, and we are content with that proof. Whosoever contends otherwise has the burden of informing us, and, in doing so, must follow the prescribed rules by which parties bring matters before judicial tribunals for determination. And as this court is the final arbiter as to what the law is, the rule is likewise binding upon inferior tribunals. We are satisfied

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that this is the true principle involved, and that no decision of this court, when properly understood, is in conflict therewith. Judicial notice does not depend upon the actual knowledge of the judges. "Courts notice without proof all, whether fact or law, that is necessarily or justly to be imputed to them, by way of general outfit for the proper discharge of the judicial function." Thayer's Prel. Evi., p. 301. When facts of law are involved, they may investigate and may refresh their judicial recollections by resorting to any means which they may deem safe and proper.—*Brown v. Piper*, 91 U. S. 37, 42, 23 L. Ed. 200; *Gardner v. The Collector, supra.*

The validity of the amendment depends upon whether it received a majority of all the votes cast thereon at the election. The Constitution itself so declares. Therefore, its validity can not depend on the subsequent omission of the state board of canvassers to determine the result or of the failure of the secretary of state to record a certificate thereof. The votes actually cast are the effective facts, and the certificate, as to the result of that vote, is evidence only of such facts. Moreover, as the certificate of determination made by the state board of canvassers and required to be recorded in the office of the secretary of state, was to be compiled from the certificates of the several county boards of canvassers of the votes cast, it would seem that the records as found in the office of the several county clerks, would as likely show the truth in that regard as would the certificate of the state board of canvassers, had one been made. The court would unquestionably, in the first instance, look to the certificate of the state board of canvassers to ascertain the result of the vote, but since there appears to be no record as to what that board did in the premises, if anything, we have resorted to the election records, returns and canvass in the offices of the several county clerks of the state, which seems to us the next best means of advising ourselves of the true facts of law here involved. As said in *State v. Stearns*, 72 Minn. 200, 219, 220, 75 N. W. 210, 215:

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> "The validity of this law depends upon whether it receives a majority of all the votes cast at the election, not on the subsequent act or omission of the state canvassing board, or of any other officers. For the purpose of determining this fact, the court will take judicial notice of the election records, returns and canvass thereof by the state board in the office of the secretary of state, and, if necessary, of the election returns and canvass in the offices of the several county auditors of the state."

While we have not received certified copies of the vote cast from the office of every county clerk of the counties existing at the time the amendment in question was submitted to a vote of the people, we have from many, and are convinced, beyond a question of doubt, that the amendment was submitted to a vote of the electors and received, for its adoption, practically a unanimous vote of those voting thereon. We are also convinced of this fact by reason of early decisions of this court at a time when the matter must have been of common knowledge, and yet, without question, the amendment was accepted as valid. In *People v. Boughton,* 5 Colo. 487, 490, decided at the December Term, 1880, involving the right to the office of judge of the county court of Larimer county under facts almost identical with those here involved, the fact of the adoption of this constitutional amendment is stated and it is held that by virtue thereof the constitution and the statute authorize the county commissioners to fill a vacancy in the office of County Judge without regard to the duration of the unexpired term. At the same term of this court, and in the same volume, pp. 455, 457, in *People v. Rucker,* the fact of the amendment is again stated, and a portion of the section, as amended, is quoted. Again, in *People v. Wright,* 6 Colo. 92, 93, decided at the December Term, 1881, this court, after stating that the right to an office, as between the parties to that suit, depended upon the construction to be given to § 29 of Art. VI of the Constitution, quotes the section as amended and says: "This section is an amend-

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ment framed and submitted by the legislature, and adopted by the people, in lieu of section 29, article VI, of the constitution as originally adopted." And in *Re. Election of District Judges*, 11 Colo. 373, 376, 18 Pac. 282, 283, it is said: "It is clear, under the provisions of section 29 as originally adopted, that, in cases of a vacancy and an election to fill it, the election would be for the unexpired term. Such is the express language of the section. The first legislature, however, submitted for adoption an amendment to section 29 of this article, which was adopted in 1878", etc.

The effect of the judgment of the lower court was to sustain the amendment, and it is, therefore, affirmed.

Judgment affirmed.

Decision *en banc.*

CHIEF JUSTICE MUSSER concurring in the result, Mr. JUSTICE SCOTT not participating.

[No. 8103.]

BROMLEY v. HALLOCK.

1. ELECTIONS—*Ballot—How the Voter Shall Express His Choice.* The voter must substantially observe the requirements of the statute. (152)

2. ——*Ascertaining the Intention of the Voter.* Where the voter writes in the blank above the list of nominations, the name of a particular party, he indicates an intention to vote for all the candidates of that party named upon the ballot, unless, in the way provided by the statute, he manifests a different intention, i. e. by inserting an X opposite the name of an opposing candidate, or if there are two or more candidates for the same office, by drawing a line through the name of those, or the one, for whom he does not desire to vote. (153)

The contestor was a candidate upon the ticket of the Progressive party. Several voters wrote at the top of the ballot the name of this party, as well as the name of another party which had made no nomina-

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tion for the office for which the contestor was a candidate, and none of these ballots bore any X opposite or near to the name of any candidate for that office. *Held* that the insertion of the names of the other parties, in addition to the Progressive party, did not tend to contradict or neutralize the purpose of the voter to cast his ballot for contestor and that the ballots must be counted accordingly. (153)

Error to the Chaffee County Court—Hon. JOSEPH NEWITT, Judge.

Mr. GILBERT A. WALKER and Mr. GEORGE D. WILLIAMS, for plaintiff in error.

Mr. WALLACE SCHOOLFIELD for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

At the November 1912 election, the parties to this action were rival candidates for the office of county clerk and recorder of Chaffee county. Mr. Hallock was the regular democratic nominee. Mr. Bromley was the regular nominee of the Republican party, also of the Progressive party. On the face of the returns Mr. Bromley was elected by the majority of thirteen. Mr. Hallock instituted this contest. Issues were joined, and upon final trial a decree was entered awarding the office to Mr. Hallock. The court, on recount, declared his majority to be twenty-six. Mr. Bromley prosecutes this writ of error.

In addition to the Democratic, Republican and Progressive parties, who had candidates for presidential electors, United States senators, congressmen, state, district and local county offices, except the Progressive party had no candidate for representative for Chaffee county, or for county treasurer, county judge or county surveyor, the ballots disclose that there were also there-

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on the nominees of what was called the Roosevelt and the Bull Moose parties, each of which had candidates for presidential electors, United States senators, congressmen, and state offices but which parties had no district or local county candidates upon the ballot; also that the Bull Moose had no candidate for congress for the second district. Otherwise, the candidates of the Bull Moose party, as well as those upon the Roosevelt ticket, for United States senator, congressmen and state offices, were identical with the candidates for those offices on the Progressive ticket, so that in so far as the Roosevelt and Bull Moose parties had candidates for any office, they were identical with each other, and were also identical with the candidates of the Progressive party for such offices. Stated differently, every candidate for any office upon the Bull Moose ticket was also a candidate for the same office on the Roosevelt and Progressive party tickets; and every Roosevelt party candidate on the ticket was also a candidate for the same office on the Bull Moose and Progressive tickets, excepting only that one McLain was the nominee of the Progressive and Roosevelt party for congressman from the second district, but was not the nominee of the Bull Moose party for such office, it having no candidate for congress for the second district.

Upon recount the court found, which finding is sustained by the evidence, that in the blank space provided for the writing in of the name of the political party, that there were nine ballots which had the words written in this space "Progressive, Bull Moose", fifteen with the words "Progressive, Roosevelt, Bull Moose," seven "Progressive, Roosevelt" and two "Roosevelt, Progressive"; and that none of these ballots had any cross mark, de-

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fective or otherwise, opposite or near the name of any candidate for the office of county clerk and recorder. Upon this finding the court held that these ballots did not disclose any intendment by either or any of the electors casting them to vote for the contestee, and declined to count them for him. In this the trial court erred.

Mr. Bromley was the candidate upon the Progressive ticket. Wherever there were any candidates upon the Bull Moose or Roosevelt tickets for any office, they were the same as on the Progressive, the only difference being that while the Progressive party had candidates for all national and state, and nearly all district and local county offices, the other two did not have any candidates for district or local county offices, or the Bull Moose a candidate for congressman in the second district.

Section 2236, Revised Statutes, 1908, in part reads:

> "That across the head of the ballot, and just above the list of nominations, shall be printed the words, 'I hereby vote a straight..... ticket, except where I have marked opposite the name of some other candidate,' and any voter desiring to vote a straight ticket may write within the blank space above provided for, the name of the party whose ticket he may wish to vote, and any ballot so cast shall be counted for all the nominees upon said ticket, except when the voter has marked opposite the name or names of any individual candidate of some other party, which individual marks opposite such individual candidate shall count for them, and shall not be counted for the candidates for the same office upon the ticket whose party name the voter has so filled in the blank at the head of the ticket."

Section 2265 in part reads:

> "If a voter marks in ink more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the choice of

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any voter for any office to be filled, his ballot shall not be counted for such office. *Provided, however,* a defective or an incomplete cross marked on any ballot in ink, in a proper place, shall be counted if there be no other mark or cross in ink on such ballot indicating an intention to vote for some person or persons or set of nominations, other than those indicated by by the first mentioned defective cross or mark, and where a cross is marked in ink against a device indicating a vote for the entire set of candidates, and also another cross in ink against one or more names in another list, such ballot shall only be held invalid as to any office so doubly marked."

Section 2266 following reads:

"If an imperfect cross or mark be found near the name of a candidate in ink, which mark appears to have been made with intent to designate the candidate so marked as the one voted for, such ballot shall not be rejected, if the intent of the voter to designate the person for whom he intended to vote can be reasonably gathered therefrom; *Provided,* that if marks placed opposite the names of individual candidates shall work to a complete exclusion of the candidates of the party, the designation of which has been written in at the top of the ballot, and the intention of the voter is clear, it shall not be necessary to strike out the names of the candidates against whom it is desired to vote."

These sections were all in force at the time of this election, and contain the only express provisions in our election laws as to what constitutes a defective ballot so that the same shall not be counted. They do not include one like those under consideration. 'Tis true that an elector, in order to properly express his choice, must do so substantially in the manner provided by statute. *Young v. Simpson,* 21 Colo. 460, 42 Pac. 666, 52 Am., St. Rep. 254; *Heiskell v. Landrum,* 23 Colo. 65, 46 Pac. 120; *Rhode v. Steinmetz,* 25 Colo. 308, 55 Pac. 814; *Wiley v. McDowell,* 133 Pac. 757; *Whitman v. Zahorik,* 91 Iowa,

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23, 59 N. W. 57, 51 Am. St. Rep. 317; *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180. It appears to us that this requirement was complied with by the electors casting these ballots. The plaintiff in error was the candidate upon the Progressive ticket; he was also upon the Republican ticket. When these voters wrote in the word "Progressive" they indicated their intention to vote for all the candidates upon that ticket, unless they performed some act otherwise which tended to defeat or neutralize such intention. The way provided by statute to have annulled this expressed intention as against any candidate for whom they did not desire to vote, was to make a cross mark opposite the name of his opponent, and if two or more were running for offices of the same name, to run a line through the name of the party for whom they did not desire to vote; neither was done. Other methods which might have this effect need not be considered; they are not involved. The fact that the electors in some instances followed and in others preceded Mr. Bromley's party name with the insertion of the words "Bull Moose" or "Roosevelt" or either, or both of them, did not under the circumstances above disclosed in any manner tend to contradict or neutralize the intention of the voter in voting for Mr. Bromley. This is readily apparent for the reason among others, that if these ballots were counted for all the candidates whose party names were written in at the top, it would not disclose any intention to vote for anyone not on the Progressive ticket, as there was no one on either of the other tickets who was not on the Progressive. The voter having substantially complied with the law, and his intention thus given not being in conflict with any other expression to be gathered from the ballot, it must be given effect as expressed, and when

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thus applied Mr. Bromley is entitled to these votes as he was the only candidate for this office on any of these tickets and the only one for whom they could have been intended.

In *Nicholls v. Barrick,* 27 Colo. 432, 62 Pac. 202 Mr. Nicholls was the candidate of the Republican party for sheriff and Mr. Barrick was the candidate of the People's Silver Republican, Teller Silver Republican, Democratic and Populist parties. It was shown that these last named several political parties had united upon the same ticket, each filling the ticket under its distinctive party name; that the ticket was generally spoken of by newspapers and the people as the fusion ticket and that the only opposition ticket was the Republican. On forty-three ballots each voter had written in the blank space provided the word "Fusion". When thus filled out they read "I hereby vote a straight Fusion ticket." It was held that these ballots clearly showed the intent of the voter and should be counted for the candidate on the combined tickets of these several parties; that they were substantially marked as the law requires, sufficient to justify their being counted. The principles there announced are specially applicable to the facts here. The electors casting these ballots come much nearer in complying literally with the statute than those whose ballots were under consideration in the former case, and their intention, not having been neutralized in any respect, when applied to this office, must be given effect as expressed.

The case of *Wiley v. McDowell, supra,* does not support the position of the defendant in error; to the contrary, its record discloses that McDowell was the candidate upon the Republican and Progressive tickets only, and that he was given the benefit of all ballots which had

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either of these party names written in at the head. He also contended that there should be counted for him the ballots which had the words "Bull Moose" or "Roosevelt" only written in at the head of the ticket, although he was not on either of such tickets, but relied solely upon evidence *aliunde* to establish that they were intended for him. This court refused to adopt his theory for the reasons stated in the opinion.

When these thirty-three ballots are added to Mr. Bromley's total, it gives him a majority, even though all other contentions were decided against him, this makes it unnecessary to consider them.

The judgment is reversed and the cause remanded with instructions to dismiss the action at the costs of the defendant in error.

Reversed with instructions.

Decision *en banc.*

MR. JUSTICE SCOTT not participating.

[No. 8144.]

RILEY v. TRAINOR.

ELECTIONS—*Ballot—How the Voter Shall Express his Intention.* Under §§ 2235, 2259 of the Revised Statutes and § 1 of the Headless Ballot act (Laws 1913, p. 685) the voter is required to express his choice by making an X in the space left for the purpose, opposite the name of the candidate for whom he desires to vote. (158)

There being three candidates for the office in question, sundry voters wrote in the spaces left for this purpose, under the word indicating the office, the names of three persons, among them the name of the contestor. No cross was set opposite the contestor's name upon any of these ballots. *Held* they were not to be counted for contestor. *Baldwin v. Wade*, 50 Colo. 107, distinguished. (159)

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Error to Crowley County Court—Hon. G. F. PATRICK, Judge.

Mr. I. H. STANLEY, for plaintiff in error.

Mr. DAN. B. CAREY, for defendant in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

At a municipal election held in the town of Ordway, plaintiff in error, Riley, and the defendant in error, Trainor, were candidates for the office of trustee of the town, for the term of two years. Upon a count of the ballots, the election judges found that Riley had received one hundred and twenty votes, and Trainor one hundred and seventeen, and, upon a canvass, Riley was declared elected. Thereupon, Trainor instituted a contest, and, after trial and recount of the votes, the court found that Trainor had received one hundred and twenty-one votes and Riley one hundred and twenty, and rendered judgment in favor of Trainor.

Several assigned errors have been argued by the plaintiff in error, but, in the view we take of the matter, it is necessary to notice one only. At the election, three trustees were to be chosen for a term of two years. On the official ballot, under the designation of that office, there were printed the names of three candidates in separate spaces, to the right of each of which there appeared the name of the party he represented and then a small square or space in which the voter might make his cross. Among these printed names was that of Riley. Below the printed names, were three blank spaces, as the law required, in which the elector might write the name of any person or persons, for whom he desired to vote, as trustee for the term designated. At the extreme right of these blank spaces were the small spaces for the cross mark, the same as appeared after the printed

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names. When the ballots were counted, three were found, in each of which the elector had written three names in the blank spaces provided for that purpose, among which was written the name of Trainor. There was no cross or mark after or near any of the six names on the ballots. In fact the three ballots, so far as that office was concerned, appeared the same as they did when given to the elector, except that the three names were written thereon in the spaces that had been blank. With respect to the particular office in question, each appeared as follows:

FOR TRUSTEES For Term of Two Years	(Vote for Three)	
GEORGE E. BEAVER	Law and Order Party	
E. I. OLIVER	Law and Order Party	
GEORGE RILEY	Law and Order Party	
J. P. Boulden		
Jas Trainor		
C. N. McNutty		

The election judges did not count these three ballots for any one for that office. The County Court held that they should have been counted for the persons whose names had been written in, and, therefore, counted them for Trainor. The election judges were right in not counting the ballots, for the electors failed to designate their choice of candidates as the law has always required. Sec. 2235, Rev. St., relating to the form of a ballot, after stating how the names of candidates shall be printed and arranged thereon, and that there shall be left at the end of the list of candidates for each different office as many blank spaces as there are persons to be elected to such office, in which the elector might write the name of

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any person not printed on the ballot, for whom he desires to vote, says:

"The ballots shall be so printed as to give each voter a clear opportunity to designate by a cross mark (X) in a sufficient margin at the right of the name of each candidate, his choice of candidates and his answer to the questions submitted, and on the ballot may be printed such words as will aid the voter to do this, as 'Vote for one,' 'Vote for three,' 'If you have not voted a straight ticket above, place a cross mark (X) with ink opposite each name you wish to vote for in the blank space left for that purpose,' and the like."

That part of the section relating to emblems and voting a straight ticket, of course, has been repealed, but its requirement that the ballot should be so printed as to afford a voter a clear opportunity to designate his choice by a cross mark is not changed. Sec. 2259 provides:

"On receiving his ballot the voter shall forthwith, and without leaving the enclosed space, retire alone to one of the voting shelves or compartments so provided, and shall prepare his ballot by marking, in ink, in the appropriate margin or place, a cross (X) opposite the name of the candidate of his choice for each office to be filled; and in case of a question submitted to a vote of the people, by marking in the appropriate margin or place a cross (X) against the answer which he desires to give; and in case of a vote for an entire or straight ticket or list of candidates, by making a cross (X) in the appropriate square after the name and emblem designating such ticket or list of candidates."

That part which relates to the voting of a straight ticket, has been repealed, but the requirement that he shall prepare his ballot by marking a cross opposite the name of the candidate of his choice for each office to be filled is still the law. Sec. 2266 provides that if an imperfect cross or mark be found near the name of a candidate which "appears to have been made with intent to designate the candidate so marked as the one voted for, such ballot shall not be rejected, if the intent of the voter to designate the person for whom he intended to vote can be reasonably gathered therefrom."

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It is clear from so much as remains of the foregoing sections that it is necessary for the voter to designate his choice by a cross-mark opposite the name of the person for whom he desires to vote. The Headless Ballot law of 1913, after the passage of which, the election in question was held, provides in Sec. 1:

"The official printed paper ballot used at elections shall be arranged and prepared as now provided by law, except across the head or top of the ballot shall be printed only the following words: 'To vote for a person, make a cross-mark (X) in the square at the right of his name.' And in order to vote for any candidate whose name appears upon such ballot the voter shall place a cross-mark (X) in the square at the right of his name."

There can be no mistaking this language. It requires that in order to designate his choice the voter must use a cross-mark as the law requires. In this case no cross-mark was used anywhere with reference to any of the candidates for the particular office in question, and the ballots ought not to have been counted. The case of *Baldwin v. Wade,* 50 Colo. 109, 114 Pac. 390, is not like this one. There, the voter made a cross-mark (X) after the name of the candidate for whom he desired to vote, and the question was to ascertain the intent of the voter from the ballot that was marked with a cross-mark substantially as the law required. Here, there is no cross-mark at all and the voters failed to indicate any choice. If these ballots are not counted, Riley will have one hundred and twenty votes, as counted by the election judges and on the trial, and Trainor one hundred and eighteen votes, on the count as made at the trial, or one hundred and seventeen, as counted by the judges. This elects Riley.

The judgment is reversed and the cause remanded with directions to dismiss the contest.

Reversed and Remanded.

Decision *en banc.*

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Mr. JUSTICE HILL specially concurring:

I agree in the conclusion that the ballots under consideration should not have been counted for the defendant in error, Trainor, for the reason that the electors casting them have not designated their choice in the manner provided by statute. I also agree with the conclusion that the requirement that the elector shall prepare his ballot by marking a cross opposite the name of his choice for each office to be filled, in the blank space provided for that purpose, has not been repealed by the Headless Ballot law of 1913. In this respect I agree that the law is the same now as it was when the case of *Baldwin v. Wade*, 50 Colo., 109, 114 Pac. 399, was decided, but I cannot agree that the legal principles here involved can be distinguished from some of those declared in the *Baldwin-Wade* case; but to the contrary, by the conclusion reached we are overruling certain alleged law pronounced in that case, and I think properly so, for, in my opinion, it is not supported by reason or authority, and never ought to have been declared. Neither can I agree with the statement that in the *Baldwin-Wade* case the voter made a cross mark after the name of the candidate for whom the majority thought he intended to vote, or that his ballot was marked substantially as the law requires when applied to the candidate, Wade, for whom this court counted the ballot; but to the contrary, the ballot shows (a photograph copy of which I inserted in my dissenting opinion) that the voter made a cross in the space provided for that purpose to cast a vote for the opposing candidate, Baldwin, and directly opposite his name, as well as to the right of his party name, and at the exact place where the law says that a cross mark shall be made in order to vote for him. Yet, regardless of this, and the statute which thus authorizes it, simply because the name of Wade was written in on the line beneath Baldwin's name, and where it did not belong, and where it was outside of the blank spaces provided for the writing in of names,

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this court refused to count the ballot for Baldwin, although cast for him as the law says it shall be, and counted it for Wade, in direct conflict with the provisions of the statutes. In my opinion the most that could be consistently be reasoned out in that case would be to say that it was impossible to determine for which candidate the voter intended to cast his ballot; but when it is considered in connection with the provisions of the statutes, it certainly ought not to have been said that the voter either made an effort to substantially or otherwise express his choice for Wade in the manner provided by law.

This case is much clearer concerning the intention of the voter than the *Baldwin-Wade* case. There is no contention that they intended to vote for any other candidate. The evidence of their intention to vote for these is strengthened by the further fact that they wrote three names in, the exact number to be elected, and did not attempt to make any mark opposite the names of any candidate whose name was printed upon the ballot, and I have not a shadow of doubt but that the electors casting these ballots intended to vote for Trainor, otherwise, as said by the majority in the *Baldwin-Wade* case "If he did not want to vote for Wade, why did he write his name in?" If the *Baldwin-Wade* case declarations are sound, the same question is pertinent here 'If they did not want to vote for Trainor, why did they write his name in?' In my opinion, there is no answer to the question other than that these electors intended to vote for Mr. Trainor, as well as for the other two gentlemen whose names they also wrote in, and the only reason they should not be counted is because the voter has failed to express his choice in the manner provided by statute. That they are required to do so is recognized by all the authorities, many of which were set forth by Mr. Justice White and the writer in our dissenting opinions in the *Baldwin-Wade* case. On the other hand, the reasoning in the *Baldwin-Wade* case is to the effect that where the statute says, if for any reason it is impossible to determine the choice of any voter for any office to be filled,

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the ballot shall not be counted, and that this clearly implies that if the converse is true, the ballot shall be counted, in the absence of any positive declaration of the statute that such a vote shall not be counted. This is followed by a declaration, in substance, that it would be a sacrifice of truth for technicality to say that such ballots ought not to be counted. If that reasoning is sound, when applied to the facts of that case, then I am impelled to suggest when applied to the facts here, that the same reasoning ought to compel this court to now say that it would be a sacrifice of truth of technicality to say that these ballots ought not to be counted for Trainor.

The weakness of the reasoning in the *Baldwin-Wade* case is demonstrated by the fact that the majority appear to have lost sight of the legal principle which is supported by all of the authorities, namely, that the declaration of a voter, in order to be effective, must be expressed in substantial compliance with the provisions of the statutes. The opinion in the present case recognizes this as the law, for which reason these votes are not to be counted, but if we were to follow the reasoning in the *Baldwin-Wade* case, this judgment ought to be affirmed, and we ought to say here, as the concluding paragraph in that case says, viz:

"It is thus seen that the county court arrived at the very right of the matter. That is the object of inquiry, and when that end is reached, no person can, in any manner, shape or form, be injured, but everyone, the voters and the candidates, are awarded and given exactly what they are entitled to."

It will thus be observed by these excerpts from that opinion that the principles attempted to be promulgated in the *Baldwin-Wade* case, are applicable to the facts here. To my mind this record discloses that the trial court so understood them, and while he was of opinion that these ballots should not have been counted, he added them to Trainor's total, in the belief that he was following the law as announced by this court in the *Baldwin-Wade* case. In this respect I think he was right,

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and I am of opinion, for this reason, that he is entitled to an apology from this court for a reversal of this judgment. The judges of election, who are usually laymen and do not read the opinions of this court, followed the statute as it reads and declined to count these ballots for Trainor, as the former ones did in the *Baldwin-Wade* case. The trial judge while having the statutes before him, was also confronted by the opinion of this court in the *Baldwin-Wade* case, and it being our latest declaration upon the subject, and its principle being specially applicable to the facts here, he unquestionably felt that he was bound to follow its conclusions and is now to be reversed for so doing, but in my opinion this reversal can only be justified by the overruling of the *Baldwin-Wade* case, which as I view it is necessary, in order to get right in this respect.

I am authorized to state that Mr. Justice White concurs in these views.

[No. 8154.]

COLORADO MIDLAND RAILWAY COMPANY v. EDWARDS.

SUPREME COURT—*Error to Court of Appeals—Jurisdiction.* Judgment in the district court for $5,000 affirmed by the court of appeals. Interest accrued thereon subsequent to the original recovery is but an incident of the judgment, and not part of it. Its accrual does not have the effect to confer jurisdiction upon this court to review the judgment of the court of appeals. (164, 165)

Error to the Court of Appeals—Messrs. ROGERS, ELLIS and JOHNSON for plaintiff in error.

Messrs. MCKEESON and TRUNER for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court:

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Upon a trial of this cause in the district court of El Paso County, a judgment in damages for personal injuries in the sum of $5,000, together with costs, was awarded and entered in favor of James A. Edwards against the Colorado Midland Railway Company. Thereupon the judgment debtor appealed the case to this court, and it was afterwards, by statute, transferred to the court of appeals where the judgment was affirmed, and an order entered remanding the cause for execution of the judgment. Before the order became effective under the rules prescribed, a writ of error was sued out of this court, directed to the court of appeals, the transcript of the record of the case lodged here, and an application made for a supersedeas. The judgment creditor thereupon questioned the jurisdiction of this court in the premises and interposed a motion to dismiss the writ of error. He contends that, as §§ 5 and 6, S. L. 1911, pp. 266, 268, of the act creating the court of appeals, limits the jurisdiction of this court to rehear cases on writ of error to that court, to those wherein the decision necessarily involves the construction of a provision of the federal or state constitution, or relates to a franchise or freehold, or a judgment for more than $5,000 exclusive of costs, and the judgment in question was for just $5,000 exclusive of costs, the writ of error will not lie.

The judgment debtor, on the other hand, maintains that, as § 3162 R. S., allows interest at the rate of 8% per annum on any judgment recovered before any court or magistrate authorized to enter up the same, from the date of its entry until satisfaction be made, the judgment of the district court was, by force of law, a judgment for more than $5,000, exclusive of costs; and, when affirmed by the decision of the court of appeals, is within the jurisdiction of this court to rehear on error.

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We think the contention of the judgment creditor is correct, and the motion to dismiss the writ of error must be sustained. The court of appeals neither increased nor diminished the judgment of the trial court, but simply affirmed it. The interest accruing subsequent to the entry of the judgment in the district court, did not, therefore, become a part of that judgment but remained an incident thereto, the judgment when entered, could have been settled, exclusive of costs, for exactly $5,000, and that necessarily measures the amount of the judgment. Interest arises, not as a part of the judgment, but as a consequence of withholding its payment, and is, therefore, an incident or mere sequence thereof.

While it is true that by the decision of affirmance the amount in controversy was augmented by the interest accruing since the entry of the judgment in the trial court, the judgment in the case, to which the decision of the court of appeals relates, remains the same, and it is that judgment, not the matter in dispute when the case was lodged here, that measures the jurisdiction of this court. Therefore, cases, relied upon by the judgment debtor, under statutes giving appellate courts jurisdiction where the sum or amount in dispute, not the judgment to which the decision relates, exceeds designated sums, are not in point. The purposes and language of the act creating the court of appeals, transferring, and permitting the transference of certain causes from the docket of this court to that, defining its jurisdiction in the premises and authorizing the rehearing of certain cases in this court by writs of error to that, force these conclusions. The court of appeals is to exist for only four years from the date of its creation. The cases it is expressly authorized to determine must come to it from the docket

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of this court, not from that of the trial court. In the limited cases where its decisions are not final, the act expressly provides that, "such cases may be reheard in the supreme court by a writ of error from the latter court under rules to be adopted by it." Clearly this means a rehearing in this court of the case as first presented to the appellate tribunal, under such rules as may be adopted by this court. In other words, it is like unto *a de novo* hearing of alleged errors having for its purpose the annulment, correction, modification or affirmance of the judgment of the trial court, irrespective of the judgment of the court of appeals. The fact that under the rule adopted by this court, errors assigned in such reheard cases are limited to those raised by the aggrieved party in his petition for a rehearing in the court of appeals, in no sense militates against this view. The principles underlying the rule is that of abandonment and in no sense changes the character of the hearing in this court. The motion interposed by the judgment creditor is, therefore, sustained and the writ of error dismissed.

Decision *en banc.*

[No. 8198.]

LANE v. LYON.

SUPREME COURT—*Jurisdiction—Declaring Attorney's Lien.* **The parties to a writ of error having stipulated to a discontinuance thereof the court is without jurisdiction to declare a lien upon the properties recovered in favor of the attorneys of the successful party, for securing the fees to which they may be entitled pursuant to contract with the client. (168)**

Error to Routt District Court—HON. JOHN T. SHUMATE, Judge.

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Motion of Parties to Dismiss and Petition for Attorney's Lien.

Mr. A. M. GOODING, and Mr. ARTHUR L. WESSELS, *Pro se.*

Mr. EDWARD C. STIMSON, and Mr. PAGE M. BREERETON, for defendant in error.

Mr. JAMES E. JEWEL, and Mr. ALBERT G. CRAIG, for plaintiff in error.

Mr. JUSTICE GABBERT delivered the opinion of the courth:

Lane and Lyon entered into a written contract for the trade and sale of certain real estate and personal property. Afterwards Lane commenced an action against Lyon to enforce the specific performance of this contract, and for damages and other relief. Gooding and Wessels were Lane's attorneys, and had a written agreement with him whereby they were to receive a contingent fee of two thousand dollars on the termination of the cause in his favor. It appears that this fee was to be paid by a conveyance of the real estate involved. After the issues were joined defendant moved for judgment on the pleadings, which was sustained and the action dismissed. Plaintiff, by his counsel, Gooding and Wessels, then sued out a writ of error from this court, and lodged the record with the clerk. After the writ of error was sued out Lane and Lyon, without the knowledge or consent of Gooding and Wessels, settled the controversy, and filed a written request that the action be dismissed at the cost of the plaintiff. Gooding and Wessels then filed a

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notice of attorney's lien, and a petition in this court to make their claim for attorney's fees a lien on all the property involved in the action, that the proceeding be not dismissed, and that they be allowed to prosecute it to judgment. Both plaintiff and defendant resist this petition, by motion to strike it from the files. Gooding and Wessels claim for lien is predicated upon their contract and the provisions of section 242 of the Revised Statutes of 1908.

We do not deem it necessary to undertake to determine what the rights of counsel may be under this section as, in our opinion, the only question is whether we have authority to entertain their petition. There is no judgment here, and whatever Gooding and Wessels' rights may be by virtue of their contract entered into with Lane and the provisions of the statute to which we have referred, must be determined in an appropriate action instituted by them in a court of competent jurisdiction. We are without original jurisdiction to entertain any such a proceeding.

The motion to strike the petition is sustained, without prejudice, and the proceeding dismissed at cost of plaintiff in error.

Motion sustained and proceeding dismissed.

CHIEF JUSTICE MUSSER and MR. JUSTICE HILL concur.

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[No. 6404.]

CITY OF COLORADO SPRINGS v. PIKE'S PEAK HYDRO-ELECTRIC COMPANY, ET AL.

1. MUNICIPAL CORPORATIONS—*Contracts—Construction.* What is received by a city for the grant of a franchise is to be considered in interpreting the provisions thereof imposing duties upon the grantee. (172)

2. ——*Validity.* A city is not to be charged by implication but only upon express contract. (188)

3. ——*Construed.* The city, by ordinance, granted to Jackson the right and privilege of erecting and operating within its limits, a plant for the production and distribution of the electrical current, the right and privilege to construct, maintain and operate dams, ditches, flumes, pipe-lines, and conduits, for the transmission of such current, and the right to divert and use, under certain conditions, for the generation of electricity, the waters of the streams, pipes and conduits of the city. Jackson, on his part, among other things, agreed to complete by a day named a certain tunnel for conveying water to the city, and, by section 9 of the ordinance, to furnish to the city "such arc lights * * * as may be required by such city for lighting its streets", at a specified rate; also to furnish to the city, free of cost, electricity for lighting the buildings of the city, and "such electrical power * * * as the city may specify * * * not to exceed fifty horse-power"; and to at all times during the term of the grant "furnish to the city" on a certain notice and demand "such other power as may be required for municipal purposes at the same price paid by the most favored customer". *Held* that the city was entitled to demand from the defendant, successor in interest of Jackson, and as against the intervenor, the most favored customer of defendant, electric power to the volume of 10,000 kilowat hours per day, for the purpose of lighting the strets, parks, buildings and other public places of the city, and the residences and places of business of its inhabitants, at the same rate and price paid by the intervenor; that such purposes were municipal in character, within the meaning of the ordinance, and that such demand was not in contravention of any right or privilege granted to Jackson by the ordinance, or any agreement of the city therein contained; that the most favored customer having notice of the terms of the ordinance, at the time of entering into its contract with the defendant, was affected by its provisions; that the ordinance contained no express agreement of the city to take from Jackson any electrical current whatsoever for lighting its streets or public places, and that such agreement was not to be

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implied; that the city was not required to take, or agree to take, the same minimum annual volume of the electrical current as contracted for by the intevenor; that the price to be paid by the city was the same as stipulated for by the intervenor, and to be diminished or increased according to the schedule set down in the intervenor's contract, according to the monthly consumption; and finally that the defendant was not entitled to contend that no vote of the electors of the city had been had, authorizing the construction and maintenance of an electric lighting plant. (174, 193)

Appeal from El Paso District Court—HON. CHARLES CAVENDER, Judge.

Mr. W. B. PRICE, Mr. C. L. MCKESSON and Mr. IRA HARRIS, for appellant.

Mr. R. L. HOLLAND and MESSRS. SCHUYLER & SCHUYLER for appellees.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This case was submitted to the district court upon an agreed statement of facts as between the appellant, The City of Colorado Springs, and the appellee, The Pike's Peak Hydro-Electric Company. Afterward the intervenor, The Colorado Springs Electric Company, was permitted to file its petition of intervention. The suit arises out of a dispute as to the construction to be given section 9 of a franchise granted by the city to Geoge W. Jackson, now owned by the appellee, The Pike's Peak Hydro-Electric Company.

At the time and long before the date of this franchise the city was the owner and in possession of certain water rights, reservoirs, pipe lines, tunnel rights, flumes, ditches, and real estate, situate in the mountains in El Paso county, west of the city, and constituting a part of the water system of that city. The requirements of the city de-

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manded the construction of a tunnel through which water was to be conducted, so as to flow into the flumes and water pipes of the city. Jackson and an associate entered into a contract with the city to construct this tunnel. Unexpected obstacles intervened which made it impossible for Jackson, who had succeeded to the rights and interests of his associate, to complete the tunnel within the contract price, or at all, because of the unexpected increase in cost, on account of such difficulties.

On the 8th day of September, 1898, Jackson obtained from the city a franchise authorizing the construction and maintenance of a power plant for the generation and sale of electrical power for a period of twenty-five years from that date. Jackson's rights under the franchise were in substance as follows:

"The right and privilege of laying, maintaining, and operating such conduits, cables, and wires in the streets and alleys within the fire limits of the city, and of erecting, maintaining, and operating such poles and wires in the streets and alleys of the city, outside its fire limits, as should be necessary for the transmission and sale to the city and its inhabitants, of electricity for the development of electrical power, and the right and privilege of renting space in the conduits. (2) The right and privilege of constructing, maintaining, and operating, at suitable places on the lands of the city, and through the lands, rights of way for streams, reservoirs, flumes, ditches, pipe lines, and conduits of the water system of the city, dams, reservoirs, pipe lines, conduits, power houses, plants, poles, wires, and cables for the transfer and transmission of electrical power, together with the right to use from such lands such earth, stone, and dead timber as might be needed to construct such power houses,

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reservoirs, plants, and dams. (3) The right to divert and use for the generation of electric power all the water of any streams, ditches, flumes, pipe lines, conduits, and reservoirs of the city, on condition that all water so diverted should be returned to the water system of the city unimpaired; provided that the use thereof under the contract should not diminish the flow of, nor pollute the water; that the city should determine what constituted waste and pollution; that Jackson, his associates and assigns, should do nothing which would interfere with the successful operation of the city's system of water works; that the work under the contract in the city should be done under the supervision of the city, and that the city reserved its right to exercise its police power over the conduits, poles, and wires provided for by the contract."

The benefits under the franchise which the city was to receive, were in substance as follows:

1. The completion of the tunnel on or before December 8th, 1899, as specified in the original contract of 1895. (2) The necessary space in all the conduits that should be laid, and on all the poles that should be erected, for the telegraph and telephone wires of the city, and freedom of access and facilities for placing and removing them, equal to those which Jackson and his associates or assigns should enjoy. (3) On the expiration of the franchise, December 9th, 1923, any electrical plant used to furnish these lights and this power, and any transforming station, wires, cables, and other improvements which Jackson, his associates or assigns, shall have then constructed, strung, or made, for the purpose of transforming and delivering electricity necessary to furnish these lights and this power, and a twenty inch water pipe line from Lake Moraine to some point in the

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town of Manitou, were to become the property of the city.

There was also the obligation upon the part of Jackson contained in section 9 of the franchise, concerning which the dispute in this action arises. This section provides as follows:

"Sec. 9. The said George W. Jackson, his associates or assigns, shall within one year after the completion of the Strickler Tunnel, and during the remainder of the term of this grant, furnish to the City of Colorado Springs, such arc lights of standard 2,000 candle power each, as may be required by said city for the purpose of lighting its streets, alleys, and public grounds, at the rate of five dollars and fifty cents ($5.50) per light per month, said lights to be used from sunset to sunrise during each and every day of each and every month; also, free of cost, such arc and incandescent lights as may be required by the said city for the lighting of the buildings belonging to the said city, not exceeding five arc lights of 2,000 candle power each, and 200 incandescent lights of 16 candle power each, or the equivalent; also, free of cost, such electrical power, to be delivered at such points in the city of Colorado Springs, as the city may specify, as may be necessary for use by said city for municipal purposes, said power not to exceed fifty (50) horse power; and will at all times during the term of this grant furnish to the said city such other power as may be required for municipal purposes, at the same prices that are paid by the most favored customer of the said George W. Jackson, his associates or assigns, provided, the city give the said George W. Jackson, his associates or assigns, ninety days notice of its intention to use any of said power in excess of fifty horse power, and the amount required."

Upon the credit of this franchise Jackson was en-

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abled to secure a large amount of money with which to discharge his debts, and proceed with the completion of the tunnel. He afterwards organized a corporation to which he assigned all his rights and privileges under the franchise, known as the Pike's Peak Power Company, which company later transferred its interest in the matter to the Pike's Peak Hydro-Electric Company, a corporation, and the appellee here. This franchise was before the United States Circuit Court of Appeals upon the validity of a subsequent ordinance of the city purporting to repeal the ordinance granting the franchise. 105 Fed., 1, 44, C. C. A., 333.

Many phases of the Jackson franchise were there discussed, and counsel for both parties to this proceeding, cite the case, and to some extent rely on it. The principal question in that case however, was the validity of the repealing ordinance, and such ordinance was held to be in violation of section 10, art. 1, of the Federal constitution which prohibits the passage of a law impairing the obligation of contracts, and the fourteenth amendment of the constitution which forbids the taking of property without due process of law. Here both parties stand upon the validity of the ordinance granting the franchise in question, but contend for a widely different construction of some of its provisions. In addition to what has been said, the agreed statement recites: (1) That Jackson or his assigns completed the tunnel referred to in the ordinance, known as the Strickler Tunnel, and has constructed and is now operating, by means of water taken, under the ordinance, from the water system of the city of Colorado Springs, an electric power plant, for the purpose of generating electric current for all purposes to which it may be applied: (2) That the defendant has heretofore been furnishing to the plaintiff free, such

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arc and incandescent lights as plaintiff has demanded, as and for the arc and incandescent lights which the plaintiff under section 9 of said ordinance is entitled to receive free of cost, and no controversy now exists between the parties hereto as to such arc and incandescent lights; that the defendant is now supplying to the plaintiff, arc lights for the purpose of lighting the streets and alleys of the plaintiff, and charging for the same at the rate of $5.50 per month, under the provisions of section 9 of said ordinance: (3) That the Colorado Springs Electric Company was on January 31st, 1903, and now is a corporation organized under the laws of the State of Colorado, and engaged in the business of supplying to the inhabitants of the City of Colorado Springs, electric current for light, power and other purposes; that on or about January 31st, 1903, the appellee made and entered into a contract with the said The Colorado Springs Electric Company, which said contract is still in force, and which covers a period of sixteen (16) years from its date, and which said contract said The Colorado Springs Electric Company has the option to renew or extend for an additional period of seven years; that by said contract the defendant agreed to deliver, and now is delivering, electric power to said The Colorado Springs Electric Company for the price, under the conditions in said contract set forth; that the price named in said contract is the lowest price that is being paid the defendant by any of its customers: (4) That prior to the filing of this agreed case, plaintiff gave the defendant notice of such intention, on its part, and demanded of the defendant that on and after ninety days from the date of such notice, it furnish and deliver to the plaintiff at the price of .585 cents per kilowatt hour, or at such price

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as said The Colorado Springs Electric Company is paying for the same, electric power in excess of fifty horse power to the amount of ten thousand kilowatt hours per day, the same to be used by the plaintiff for the municipal purpose of operating an electric light plant, whereby such power shall be distributed throughout the city of Colorado Springs, to be used for lighting the streets, alleys, parks and other public grounds, and the buildings of said city, and also whereby such power shall be sold to and distributed among the inhabitants of said city, to be used in lighting their residences, grounds and places of business. That although the defendant is now able to generate and deliver, and is now generating, by means of water system of the plaintiff, all the electric power and current necessary to comply with the above mentioned demand of the plaintiff, the defendant immediately notified the plaintiff that it would decline at any time to furnish the plaintiff such power, or any part thereof, for the purposes aforesaid, at the price paid therefor by said The Colorado Springs Electric Company, and wholly denied any duty or obligation on its part so to do, and that the defendant has at all times since denied that there was any duty or obligation resting on it under section 9 of said ordinance to furnish such electric power to the plaintiff, for the purposes above mentioned, or at the price aforesaid: (5) The plaintiff claims that the said The Colorado Springs Electric Company is the most favored customer of the defendant power company:

The ordinance granting the franchise and the contract between the Pike's Peak Hydro-Electric Company, and the Colorado Springs Electric Company, referred to in the agreed statement, are set out in full as exhibits.

The prayer of the city under the agreed statement is:

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"The plaintiff claims it is entitled to, and prays for a judgment against the defendant decreeing and finding, that under section 9 of said ordinance, it is the duty of defendant, ninety days after this date to deliver to plaintiff electric power in excess of fifty horse power, to the amount of 10,000 kilowatt hours per day, at and for the price paid by The Colorado Springs Electric Company, for the purpose of operating the electric light plant hereinabove mentioned, for the purposes mentioned, and ordering and directing said defendant to deliver such power to plaintiff at said time, or at any time thereafter that plaintiff may be ready to receive it, at and for the price aforesaid."

The Colorado Springs Electric Company was permitted to intervene. Its contract with the defendant, was not made until several years after the date of the Jackson franchise, and was made with knowledge, and in the light of that ordinance. Not only is the franchise referred to in that contract, but it is a singular and unusual fact that the parties to the contract specifically state therein their disagreement as to the construction to be placed on section 9, now in controversy, though in this case, they appear to be in entire harmony in that particular.

This full knowledge of the terms of the Jackson franchise and the difference in the matter of its construction, is clear from the reading of paragraph eleven of the contract between the defendant and the intervenor as follows:

"11. It is understood and agreed that this contract is in no wise to be considered as a waiver by the Power Company of any of its rights under the said franchise granted to George W. Jackson by the City of

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Colorado Springs, and that the power company may, at any time during the life hereof, and at any time after it shall be in position to furnish the lights and power herein referred to, demand of the City of Colorado Springs that it permit the Power Company to furnish to the City of Colorado Springs, and that the city purchase from the Power Company, the lights and power provided for, in and upon the terms and conditions mentioned in section 9 of the said Jackson franchise for the remainder of the term of said franchise; and it is agreed that, when the said City of Colorado Springs, voluntarily or involuntarily, permits the Power Company to furnish the lights and power as provided in section 9 of said Jackson franchise, for the remainder of the term thereof, the Electric Company shall assume and perform all of the obligations imposed by the said section, so far as such obligations relate to the supply of lights and power, using its own distributing system for that purpose, upon receiving an assignment from the Power Company, in due form, of all its rights under the said section, which assignment the Power Company agrees to make; but The Electric Company shall in no way assume any of the obligations of the Power Company to construct any works or plants for carrying out the provisions of such contract, or to turn over to the City of Colorado Springs any works or plants used for performing such obligations; it being understood between the parties hereto that the Electric Company shall assume the obligations as to supplying light and power of said section 9 of the Jackson franchise when accepted for the remainder of the term thereof by the city, as above provided, whether such acceptance on the part of the city is voluntarily granted, and the obligations of the city voluntarily recognized, or

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in any manner voluntarily enforced, inasmuch as the Power Company is by its counsel advised, and now believes, that the said section 9 of said Jackson franchise of itself, and in connection with the other sections thereof, constitutes a binding contract obligating the City of Colorado Springs to purchase its street lights upon the terms and conditions therein mentioned, when and as soon as the power company shall be in a position, and the water power shall have been sufficiently developed, to furnish said lights, while the Electric Company is advised by counsel and believes that neither said section of itself, or in connection with the other sections of said franchise constitutes a binding contract, but is merely an option on the part of the City of Colorado Springs. The provisions of this paragraph are understood by the parties, and are to be construed as in no way conflicting with or abrogating or modifying the obligations of either part under other parts of this agreement."

It will be seen from this, that while counsel for the intervenor contends strenuously here, having reference to the arc lights, and the stipulated price to be paid therefor. "The city has expressly bound itself to take and use these lights, we desire most earnestly that if we are mistaken in this position, then we insist that regardless of there being an express contract, binding upon the city, there is, nevertheless, an obligation upon the city to take and pay for these lights, which is necessarily implied." Yet at the time of the contract it viewed the matter in an entirely different light, for it there said, as to section 9, and other sections of the franchise: "While the Electric Company is advised by counsel and believes that neither said section of itself, or in connection with the other sections of said franchise constitute a binding

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contract, but is merely an option on the part of the city of Colorado Springs."

The contract then, between the intervenor and the defendant was made with full knowledge of the rights of the city under the franchise, and was clearly subject to any and all such rights.

Specifically, the demand of the city in this case is for power which it claims under section 9 of the franchise to the extent of 10,000 kilowatt hours per day, and at the price paid by the Colorado Springs Electric Company, as the most favored customer of the power company, for the purpose of operating an electric light plant, to be used for lighting the streets, alleys, parks and other public grounds, and the buildings of said city, and also whereby such power shall be sold to and distributed among the inhabitants of said city, to be used in lighting their residences, grounds and places of business. This it claims under that part of section 9, as follows:

"And will at all times during the terms of this grant furnish to the said city such other power as may be required for municipal purposes, at the same prices that are paid by the most favored customer of the said George W. Jackson, his associates or assigns, *provided*, the said city give the said George W. Jackson, his associates or assigns, ninety days' notice of its intention to use any of said power in excess of fifty horse power, and the amount required."

The contention of the defendant and intervenor against this is: (a) That the purpose for which the power is demanded is not a municipal purpose within the meaning of section 9 of said Jackson franchise.

(b) That such purpose and demand of the city is not within the contemplation of section 9 of said

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Jackson franchise or any part thereof, and for said city to take power for said purpose is and would be in contravention of that part of section 9 of the said Jackson franchise in which as claimed by defendant said city contracts with George W. Jackson, his associates or assigns, to take from him or them all arc lights that may be required by said city for the purpose of lighting its streets, alleys and public grounds at the rate of Five Dollars and fifty cents per light per month, and the provisions of said section 9 under which the defendant has the right to furnish such arc and incandescent lights as may be required by the said city for the lighting of the buildings belonging to said city; and because the operation of such a plant, for such a purpose would contravene the provisions of section 9 and the contract and privileges which defendant enjoys thereunder, and constitute an impairment of the obligation of contracts.

(c) Because, under said section 9, and the facts therein set out, it is not the duty of defendant to furnish power to the plaintiff, unless the plaintiff will agree to take the same minimum amount of power as is taken by the Colorado Springs Electric Company, to-wit: $64,000 worth per annum, by virtue of which agreement defendant claims the prices named in the said contract between the defendant and The Colorado Springs Electric Company were fixed."

The District Court sustained the contentions of defendant Power Company, and dismissed the action. Clearly under the language of the agreement, to-wit: "And will at all times during the term of this grant furnish to the said city such other power as may be required for municipal purposes at the same prices that are paid by the most favored customer of the said George W.

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Jackson his associates or assigns, provided, the said city give the said George W. Jackson, his associates or assigns , ninety days' notice of its intention to use any of said power in excess of fifty horse power, and the amount required," the obligation to furnish power is limited only by the term "for municipal purposes." If the purpose for which the power is demanded is a municipal purpose, the city is within its right in making such a demand, unless such right is clearly negatived by some other provision of the franchise.

It will be noticed that the power company was to furnish fifty horse power to the city for municipal purposes, without price, and without notice, and the fact that ninety days notice was agreed upon in case of demand of such other and additional power, would seem to contemplate a large amount of power, and the consequent time for preparation for its delivery.

The grant of the Jackson franchise was for a public purpose, and was so construed by Judge Sanborn in 105 Fed., *supra,* for, as was said in that opinion, a grant for a private purpose is one from which neither the city nor its citizens derive any consideration or benefit. It is apparent that the grant in this case does involve consideration and benefit to the city and its citizens. Its purpose was the improvement of its water works and lighting systems. To sustain his conclusion, Judge Sanborn quotes from page 1144 3 Mills, Ann. Stat., as follows:

"They (city councils) shall have power to purchase or erect water works or electric light works; or to authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town, who are taxpayers under the law, voting on the question at a general or special election, by vote approve the same."

The court in that case said: "The purpose of the city in making the contract of September 8, 1898, was to enlarge its waterworks, to increase its supply of

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water, and to furnish itself and its inhabitants with electric light."

The defendant power company, contends and the lower court held, that the words "municipal purposes" as used in the franchise should be interpreted as meaning "governmental functions." But this contention was distinctly denied in the opinion in that case, for it was said:

"Another position urged by counsel for the appellee is that the system of water works of this city, its streets, parks, and public grounds, are held by the municipality in its political or governmental, and not in its proprietary or business capacity; that consequently, they cannot be diverted from municipal uses, and a city council cannot make any agreement or contract relative to them which a succeeding council may not freely annul. The proposition is not novel. It has received the careful consideration of this court, and, so far as the question it presents is material to the issues in this case, it is no longer open to debate here. In *Ill. Trust & Savings Bank v. City of Arkansas City,* 76 Fed. 271, 282, 22 C. C. A. 171, 181, 40 U. S. App. 257, 276, 34 L. R. A. 518, 525, this court announced its conclusion in these words: 'A city has two classes of powers,—the one legislative, public, governmental, in the exercise of which it is a sovereignty, and governs its people, the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city, and of the city itself, as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern

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a private individual or corporation. Dill. Mun. Corp. (3rd Ed.) § 66, and cases cited in the note;—*Safety Insulated Wire and Cable Co. v. City of Baltimore,* 13 C. C. A. 375, 377, 378, 66 Fed. 140, 143, 144; *San Francisco Gas Co. v. City of San Francisco,* 9 Cal. 453, 468, 469; *Com. v. City of Philadelphia,* 132 Pa. 288, 19 Atl. 136; *New Orleans Gaslight Co. v. City of New Orleans,* 42 La. Ann. 188, 192, 7 South, 559, 560; *Tacoma Hotel Co. v. Tacoma Light & Water Co.,* 3 Wash. St. 316, 325, 28 Pac. 516, 519, 14 L. R. A. 669 [28 Am. St. Rep. 56]; *Wagner v. City of Rock Island,* 146 Ill. 139, 154, 155, 34 N. E. 545, 548, 549, 21 L. R. A. 519; *City of Vincennes v. Citizens' Gaslight Co.,* 132 Ind. 114, 126, 31 N. E. 573, 577, 16 L. R. A. 485; *City of Indianapolis v. Indianapolis Gaslight & Coke Co.,* 66 Ind. 396, 403; *Read v. Atlantic City,* 49 N. J. Law, 558, 562, 9 Atl. 759. In contracting for water works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such contract is not to govern its inhabitants, but to obtain a private benefit for the city itself, and its denizens. 1. Dill. Mun Corp. § 27; *City of Cincinnati v. Cameron,* 33 Ohio St. 336, 367; *Safety Insulated Wire & Cable Co. v. City of Baltimore, supra,* and cases cited under it."

The many definitions and citations presented by the appellee are not inconsistent with this conclusion. The mere fact that a municipal corporation may possess the two separate and distinct powers, the one termed governmental or public, and the other private, corporate or ministerial, does not detract from the conclusion that all such powers are alike municipal, for both are delegated powers to be used, for the use and benefit of the municipality and its inhabitants. Counsel for defendant relies on *San Francisco v. Spring Valley Water Works,* 48 Cal. 493, to sustain its contention. But that case simply determines that a private corporation authorized to furnish water for the city was not thus endowed with municipal powers, that such a corporation must be organized under the gen-

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eral laws of the state, and it is not within the constitutional power of the legislature to confer municipal powers upon a private corporation.

While functions of the municipality, such as the erection and maintenance of public utilities, are not governmental in their nature, yet they are strictly municipal purposes, that is to say they are intended specially and peculiarly to promote the comfort, convenience, safety and happiness of the citizens of the municipality, though perhaps not essential to the welfare of the general public. 28 Cyc. 268.

Hence, in the light of these authorities it cannot be said that in the granting of the franchise, the city did not, and did not intend to provide for power for all municipal purposes. To so hold is to impute to the city counsel either ignorance, or bad faith with its people. The practice of the courts in referring to this class of municipal purposes other than governmental, as private, has had a tendency to confuse, in as much as those cannot be said to be in any sense private, as that term is commonly understood. The purpose is essentially a public one, and for the general good of all the inhabitants, the support of which is provided for by a public tax, levied upon all the citizens and property of the city.

The very fact that the legislature has conferred the power upon cities to erect and maintain gas and electric light plants, water works, etc., to supply its citizens, to be paid for from taxes to be levied upon the inhabitants, is sufficient determination of the municipal purpose and character of these utilities. The power of the legislature to do this is not questioned in this case, and is universally recognized by the courts. *Jacksonville Electric Light Co. v. Jacksonville,* 36 Fla. 229, 18 So. 677, 30 L. R. A. 540, 51 Am. St. 24.

Judge Elliott in his recent work on Municipal Corporations has stated as the rule; "The erection of an electric light plant to supply a city with light for use in the streets and public places, and in the homes and places of business of the inhabitants, is a municipal pur-

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pose for which bonds may be issued and taxation authorized."

The language of the franchise is that the grantee will at all times furnish to the said city such other power as may be required for municipal purposes, at the same prices that are paid by the most favored customer of the said George W. Jackson, his associates or assigns, with the provision only that the city shall give ninety days notice of its intention to use any of such power and of the amount required.

There is nothing in the language of the franchise or the extent of its purpose that would indicate a different intent of the parties than the exact language conveys, or as the city contends, nor does it appear to be unreasonable.

The franchise is purely one for the generation of electric power. It does not purport to grant the right or privilege of erecting or maintaining an electric light plant, or of supplying lights to the inhabitants, or of using the streets and alleys for such purpose. Neither does it appear that Jackson or his assigns have otherwise construed the franchise, by the erection of a light plant, or by furnishing electric light to the citizens or even for street purposes, for the latter were supplied by the Electric Company to whom Jackson and his assigns sold power.

The generation and sale of electric power is the sole business in which Jackson and the defendant, his assignee, has been engaged. This power has been sold, not only to the intervenor, but to other cities, and to industrial companies. Then why is it not entirely reasonable to conclude that as one of the considerations of the granting of so valuable a franchise, the city should reserve to itself the right to purchase the power it might at any time require, upon the same terms as the most favored customer of the owners of the power plant, to be so erected, under and by virtue of the franchise. Aside from this the city was to receive comparatively little for the franchise granted. It was to receive such arc lights

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of indicated power, as it might require at the stipulated price of $5.50 per month. But it does not appear that this was not the reasonable or adequate value for such service. The only free service that the city might receive under the franchise was five arc lights of 2000 candle power each, not more than 200 incandescent lights of 16 candle power each, and the maximum of 50 horse power if required. Certainly this was small consideration for so valuable a grant, and it may well be concluded that the city had in view the very purpose which it now contemplates, supplying its own citizens with light, by means of its own lighting plant. Indeed, it is not conceivable that the city could use any considerable amount of power for any other purpose, within the scope of its municipal power, as then and now understood.

The second proposition of the Power Company is that the demand of the city, in so far as it relates to power to be used for lighting the streets, is a direct impairment of the obligation of the contract wherein it is provided that "Jackson and assigns shall within one year from the completion of the Strickler tunnel, and during the remainder of the term of the grant, furnish to the City of Colorado Springs, such arc lights, of standard 2000 candle power, each, as may be required by said city for the purpose of lighting its streets, alleys and public grounds at the rate of five dollars and fifty cents ($5.50) per light per month, said lights to be used from sunset to sunrise during each and every day of every month."

The argument of counsel is based upon the assumption that the city agreed to take these lights and at such price for the full term of the grant. There is no such express agreement, for the only stated provision is that Jackson shall furnish the lights, and not that the city shall take and use them for any period whatsoever, or at all. But if the contract did so provide, then there is nothing in the grant to prevent the city from constructing its own plant, and furnishing light to its inhabitants, and to serve the city's other purposes.

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The contract refers to no other lights, for which the city was to pay, than its requirements for arc lights, of the power and at the price named. The only express agreement upon the part of either party in this respect was that Jackson shall furnish such arc lights as may be required by the city. We do not find any authority to sustain the contention of appellee that the city may be bound by implication or otherwise than by express agreement. That an obligation of the public in such a case be expressly stated, and will not be implied, is settled by the Supreme Court of the United States in *Helena Water Works Company v. Helena,* 195 U. S. 383, 49 L. Ed. 245, 25 Sup. Ct. 40. That was a case where the water works company had contracted to supply the city and its inhabitants with water for a period of twenty years. At the time of the agreement the city council made an appropriation covering the price of the water for the city's purposes for five years of that period. It was conceded by the court for the purposes of that case only, that the effect of such appropriation by the city, was that of an agreement to pay the agreed price for the period of five years, but the contention of the company that the city was bound by implication for the full period of the franchise was denied. Upon that question the court said:

"Properly construed, we think this ordinance shows an agreement upon the part of the company to furnish water to the inhabitants of the city at not exceeding certain maximum rates, and to the city itself, upon terms to be agreed upon, made definite, as far as the city was concerned, for the term of five years. As thus interpreted we do not find anything in this contract that prevents the city, certainly after the expiration of five years, from constructing its own plant. It has not specifically bound itself not so to do, and, as has been frequently held in this court, nothing is to be taken against the public by implication. *Hamilton Gaslight & Coke Co. v. Hamilton,* this court, nothing is to be taken against the public by implication. *Hamilton Gaslight & Coke Co. v. Hamilton,* 146 U. S. 258, 36 L. Ed. 963, 13 Sup. Ct. Rep. 90; *Long Island*

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Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718, and cases cited in the opinion. Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case in *Walla Walla v. Walla Walla Water Co.,* 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. Rep. 77. It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable, and perhaps unprofitable; but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract."

Counsel for defendant cite *Minn. Lumber Co. v. Whitehurst,* 160 Ill. 85, 31 L. R. A. 529, 43 N. E. 774; *Leadville Gas Co. v. Leadville,* 9 Colo. App. 400, 49 Pac. 268; and *Golden Cycle Mining Co. v. Rapson Coal Co.,* 188 Fed. 179, 112 C. C. A. 95, and sustaining its contention that because of the agreement upon the part of Jackson to furnish the city such arc lights "as may be required by the city" during the life of the franchise, the city is for that reason impliedly bound to take such lights at the price named for such full term of the franchise.

These cases, with the exception of the Leadville case, all involved private and not public contracts. The present case involves a public contract, and the city has not specifically bound itself to take such lights for any period whatsoever, and as said in *Helena Water Works Co. v. Helena, supra,* "nothing is to be taken against the public by implication." But the cases relied on do not sustain the contention of the Power Company. In *Minnesota Lumber Co. v. Whitehurst Coal Co.,* as was said by the court, "appellant *had agreed to buy,* and *appellee had agreed to sell* and deliver, all coal which would be needed for the season." The dispute in that case was as to the construction of the word "require" as used in the agreement.

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Leadville Gas Co. v. Leadville, supra, was an action for recovery of the price of gas had and received by the city under its contract. The contention of the city was that the contract was invalid because no prior appropriation had been made by the city council to cover the expense, under the provision of sec. 4449 Mills. Ann. Stat.

In *Golden Cycle Mining Co. v. Rapson Coal Mining Co., supra,* it was expressly agreed that "*the mining company agrees* to buy from the coal company all the coal it may use, etc., for the period, and *the coal company agrees to supply and deliver* all such coal, etc." This was an express agreement upon the part of both parties, which is not found in the franchise under consideration. In our opinion the contract neither placed obligation on the city to take from Jackson any light at all, nor limited its rights and privileges in that respect in any manner whatsoever, even admitting for the sake of the argument that the city had power so to do, which is not necessary to determine here.

The contract is entirely silent as affects any such obligation on the part of the city, and if it was the intention of the parties that the city should be so obligated, the contract should have so stated, rather than that courts be asked to insert it into the agreement. Indeed, section 9 of the franchise in so far as it effects the city, can be construed only as an option to purchase, as it relates both to arc lights and to power, wherein the price at which such purchase may be made, is definitely stated as to the former, and certainly determinable as to the latter, under the terms of the agreement. The valuable grant to Jackson is a sufficient and valuable consideration for such option.

The third contention of the defendant company is that it is not its duty to furnish the power demanded by the city, unless plaintiff will agree to take the same minimum amount of power contracted for by the Colorado Springs Electric Company, or a minimum of about $64000 per annum.

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This seems to admit the unsoundness of the claims of defendant heretofore discussed, for if the city was not entitled to any such power as claimed, clearly it was not entitled to or required to demand power to the extent of $64000 in value per annum. But there is nothing in the agreement by which such claim of defendant can justly be inferred, or even suspected. The agreement is that the holder of the franchise will at all times during the term of the grant "furnish to the city such other power as may be required for municipal purposes." Plainly, this must mean much or little, dependent upon the requirement for the specific purpose. It is not within the province of the court to rewrite the agreement for the parties. Much is said in the briefs as to the construction of the word "required." We do not find it important or necessary to enter into any nice distinctions in that regard in this case, or to even discuss it, in view of our conclusions above stated. There can be no other conclusion in either of the instances in which the word is used in section 9 of the franchise, whether relating to arc lights or power, than that it refers to that which may be necessary for the purposes specified.

It is agreed in the briefs that the Colorado Springs Electric Company is the most favored customer of the defendant. The price then fixed in defendant's agreement with that company should govern. This then, under the terms of the franchise is the price at which the city is entitled to receive the power demanded in this case.

Counsel for defendant in error makes an ingenious argument to show that this price is augmented and the price to the city made undeterminable by other provisions contained in the contract with the Electric Company; (a) the amount to be consumed by the Electric Company, minimum and maximum; (b) the question of competition avoided under the agreement between the Electric company and the Power company; (c) the fact that the Electric Company was to furnish transmission

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lines from Manitou to Colorado Springs, and (d) possible transformer and transmission losses.

The last two of these propositions can in no event be considered for in the agreed statement, the claim of the city is for the right to demand and receive from the Power Company, and at the price paid by the Electric Company under its said contract, the amount of power claimed, "to be measured and delivered to plaintiff at the same places where power is measured and delivered" to the Electric company. And it is provided in the contract between the two companies that all power supplied thereunder shall be delivered at the eastern limit of the city of Manitou, to transmission lines to be furnished by the Electric company.

The place of delivery to the city must therefore be held to be at such eastern limit of the city of Manitou and hence the question of the cost of transmission lines and losses in transmission from such point to the city of Colorado Springs is not involved.

The price was to be that agreed upon between the Power company and its most favored customer, and this is admitted to be the Electric company.

The term price cannot be said to include anything but the rate fixed by the contract for the sale of the commodity. The price under the terms of paragraph seven, of the contract between the Power company and the Electric light company, and which paragraph must be controlling in the fixing of price to be paid by the city of Colorado Springs, was to be 5.85 mills per kilowatt hour, when the monthly consumption does not exceed one million kilowatt hours, and when the average daily load factor for the calendar month is from fifty to fifty-seven per cent.

But when the said load factor is less than fifty per cent, the rate per kilowatt hour is to be increased .05 of a mill for each per cent of such decrease of load factor, down to forty-five per cent, but no decrease of load factor was to be considered below forty-five per cent in fixing the rate. Therefore the rate for less than forty-five

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per cent would be 5.85 mills, added to .25 mills for the five per cent decrease in load factor, or 6.10 mills per kilowatt hour.

The amount demanded by the city is much less than one million kilowatt hours per month, and if the load factor is forty-five per cent or less, the price to the city under the said paragraph in the agreement, for the amount so demanded, must be 6.10 mills per kilowatt hour.

If, however, the said load factor shall exceed forty-five per cent, then the rate must be reduced according to the schedule contained in the said contract between the electric company and the power company.

This was the agreed price at which the power was to be sold and purchased in the contract with the most favored customer, and the city cannot be hampered by other and different contract agreements, which may or may not have had influence in fixing that price. It is the price fixed for the sale of the commodity that is to govern.

Finally defendant contends that it does not appear in the agreed statement that there has been a vote of the qualified electors, of the city authorizing the construction of and maintenance of an electric light plant, as required by the statute, and therefore the city may not demand the power to be used for that purpose.

This is not a question that defendant can raise in this case. It does not involve the right or power of the city to erect and maintain an electric light plant for the purposes asserted, nor to levy taxes therefor. It is simply a question of procedure provided by the statute in such case, and the court cannot presume that the city has not, or will not, proceed in accordance with the requirements of the statutes.

The judgment of the district court is reversed with instruction to that court to enter judgment for the city in accordance with the prayer of its complaint, and the views herein expressed.

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En banc.

WHITE, J. and GARRIGUES, J. dissent.

BAILEY, J., agrees to the construction given the contract, but dissents upon the record before the court, upon the proposition of fixing the rate at which the city is to be furnished current.

[No. 6851.]

IMPERIAL SECURITIES COMPANY v. MORRIS.

1. TAX DEED—*In statutory form, prima facie evidence.* A tax deed which recites that the sale was made in substantial conformity with the requirements of the statute is *prima facie* evidence of everything of which the statute declares that it shall be evidence. (197)

2. ——*Deed Construed.* A tax deed recited that the treasurer did "on the 15th day of October * * * at the sale begun and publicly held on the 14th day of October * * * expose to public sale at &c. * * * in substantial conformity with the requirements of the statute * * * the real property above described" and that "at the sale so held as aforesaid * * * no bids were offered &c. * * * and the treasurer having become satisfied that no sale of said property could be had" the same was stricken off to the county. *Held* that in view of the recitation that the statute was substantially observed it was not to be inferred that the lands were not offered on the 14th of October; that the phrase "at the sale so held as aforesaid" was not to be taken as referring only to what occurred on the day on which the lands were sold; that the statute does not require that the deed should disclose the day on which the land was first offered, and no presumption is to be indulged in contravention of the express recitals of the instrument, and the provisions of the statute. *Held*, further that the deed did not indicate that the county was a competitive bidder. (200, 203)

3. CASES OVERRULED, *distinguished or explained.* The rule announced in *Charlton v. Toomey*, 7 Col. Ap. 304, that the recitals of a treasurer's deed of land sold for taxes must affirmatively show that every preliminary step required to divest the title was regularly taken as prescribed by law, must be read in connection with the statute declaring the effect of the deed. The statute is not to be ignored. (197)

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The opinion in *Bryant v. Miller* 48 Colo. 192, so far as it assumes that, where at a tax sale land was stricken off to the county on the second day of the sale, the deed must recite that the lands were offered on the first day, and again offered on the second day; so far as it assumes that in such case, a deed in the statutory form discloses that the lands were not offered upon the first day; and so far as it assumes that the deed must set forth the different dates upon which the lands were offered, and when the county is the purchaser must disclose when the lands were first offered, and the day of each subsequent offer, is overruled. (203, 204)

4. PRECEDENTS.—*Opinion Often Cited*, will nevertheless be overruled if, on more mature consideration, found to announce heretical doctrine, in the absence of special reasons for applying the maxim *stare decisis*. (204)

Appeal from Logan District Court.—H. P. BURKE, Judge.

MESSRS. ALLEN & WEBSTER, for appellant.

MR. S. E. NAUGLE, MR. JOHN E. FETZER, for appellee.

Mr. JUSTICE HILL delivered the opinion of the court:

This action brought by the appellee is in ejectment for the recovery of one hundred sixty acres of land situate in Logan county. Both parties claim title through tax deeds. Under agreed statement of facts but two questions are raised. The first is, whether the appellant's deed is void upon its face; if not, it is conceded that the judgment should be reversed, in which case the other question which involves the validity of a tax deed through which the appellee claims title, need not be considered. That portion of the appellant's deed which it is claimed makes it void upon its face reads:

> "And, whereas, the treasurer of the said county did, on the 15th day of October, A. D. 1895, by virtue of the authority vested in him by law at (an adjourned sale) the sale begun and publicly held on the 14th day of October, A. D. 1895, expose to public

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sale at the office of the treasurer, in the county aforesaid in substantial conformity with the requirements of the statute in such case made and provided, the real property above described for the payment of the taxes, interests and costs then due and remaining unpaid on said property; and,

WHEREAS, At the sale so held as aforesaid by the said treasurer, no bids were offered or made by any person or persons for the said property, and no person or persons having offered to pay the said taxes, interest and costs upon the said property for that year, and the treasurer having become satisfied that no sale of said property could be had, therefore, the said property was, by the then treasurer of the said county, stricken off to the said county and a certificate of sale was duly issued therefor to the said county in accordance with the statute in such case made and provided."

Counsel for appellee admit, that the deed follows the statutory form literally, except as to the blanks left for names, dates, description, etc., but insist, that it must also recite sufficient facts to affirmatively show that the proper prerequisites to a valid and legal sale were complied with, and that all the statutory requirements necessary to support a valid sale and make a treasurer's tax deed good, must be shown on the face of the deed; that the deed fails to recite the necessary prerequisites to a valid sale, under the circumstances, where it was stricken off to the county; that it affirmatively shows that the sale was irregular, though the language in the deed is in substantial compliance with the statutory form. *Charlton v. Toomey,* 7 Colo. App., 304, 43 Pac. 454, is relied upon to support this contention. In that opinion it is said, "By recitals of the instrument by which the attempt to convey is made it must affirmatively appear that every preliminary step required to divest the title of the owner was regularly taken as prescribed by law." Such was the rule of the common law; but, if it was intended by this statement to announce as a rule of law a tax deed substantially in conformity with the requirements of the statutes

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is not *prima facie* evidence of the regularity of the ministerial acts preceding the tax deed, and such other matters as the statutes say it shall be *prima facie* evidence of, then such statement is directly in conflict with the opinions of this court wherein it has repeatedly been held that the statutes of this state abrogate the rule of he common law as to the proof required in such cases. This matter was gone into fully in the opinion by Chief Justice Hayt in *Waddingham v. Dickson,* 17 Colo. 223, 29 Pac. 177, wherein it was held that a tax deed, regular in form, was *prima facie* evidence of certain facts, the ninth being (as stated in the statutes) "that the sale was conducted in the manner required by law", and that this, when considered in connection with Section 3790, Mills' Annotated Statutes then in force, places the burden of overthrowing a tax deed, regular in form, upon the party claiming title adversely thereto. It follows that the rule announced in *Charlton v. Toomey, supra,* must be limited and taken in connection with the form of the tax deed prescribed by statute, otherwise it ignores the provisions of the act which provide that a deed in a certain form shall be *prima facie* evidence of certain facts. The announcement in *Charlton v. Toomey* was certainly never intended to ignore the provisions of the statutes, if it was it would be in direct conflict with numerous decisions of this court. The correct rule, as we understand it, is that if the deed is in substantial conformity with the provisions of the statute and recites therein, as this one does, as provided by statute, "that the sale was made in substantial conformity with the requirements of the statute in such cases made and provided", it is *prima facie* evidence of all matters which the statute says it shall be, unless some statement therein shows affirmatively that the requirements of the statute were not complied with.—*Dyke v. Whyte,* 17 Colo. 296, 29 Pac. 128; *Lebanon Mining Co. v. Rogers,* 8 Colo. 34, 5 Pac. 661; *Waddingham v. Dickson,* 17 Colo. 223, 29 Pac. 177; *Knowles v. Martin,* 20 Colo. 393, 38 Pac. 467; *Crisman v. Johnson,* 23 Colo.

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264, 47 Pac. 296, 58 Am. St. Rep. 224; *Security & Bond Co. v. Wolfe,* 27 Colo. 218, 60 Pac. 637; *Lovelace v. Tabor M. & M. Co.,* 29 Colo. 62, 66 Pac. 892.

The next contention is, conceding *arguendo* that the rule above announced, supported by the authorities last cited, is the correct one, that the recitals in this deed show that the land was offered for sale for the first and only time on October the 15th, and on that day stricken off to the county, which, if correct, of course discloses affirmatively that the statute was not complied with in making the sale. Do the recitals in this deed show affirmatively that the property was exposed for sale for the first time the second day of the sale? It recites that the treasurer, on the 15th of October, at the sale begun and publicly held on the 14th, exposed to public sale, etc., the real property above described, etc. This recital includes a statement to the effect that the sale was begun upon October the 14th; if true, then some property had to be offered for sale upon that date; it does not state what property was offered upon the 14th, or whether this particular property was or was not offered; it is silent upon that subject. The recitals,

"Whereas, the treasurer of the said county did, on the 15th day of October * * * at (an adjourned sale) * * * expose to public sale * * * in substantial conformity with the requirements of the statute * * * the real property above described * * * and,

Whereas, at the sale so held as aforesaid by the said treasurer, no bids were offered or made by any person * * * for the said property, * * * and the treasurer having become satisfied that no sale * * * could be had, therefore, the said property was * * * stricken off to the said county," etc.

certainly do not show that the property was not exposed to sale upon October the 14th, or that October the 15th was the first time it was exposed for sale; but to the contrary, they are silent upon this subject. They disclose that it had not been sold upon the 14th, otherwise it would not have been offered upon the 15th. In consider-

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ing this question it is proper to look at the other recitals in the deed, one of which is that this land was exposed to sale in substantial conformity with the requirements of the statute in such case made and provided. Another is,

"Whereas, At the sale so held as aforesaid by the said treasurer, no bids were offered or made by any person or persons for the said property, and no person or persons having offered to pay the said taxes, interest and costs upon the said property for that year, and the treasurer having become satisfied that no sale of said property could be had, therefore, the said property was, by the then treasurer of the said county, stricken off to the said county and a certificate of sale was duly issued therefor to the said county in accordance with the statute in such case made and provided."

It is claimed that the words "at the sale so held" as used in this paragraph refer to the sale upon October 15th only. In giving an interpretation to this language it is elementary that the instrument should be considered as a whole, when thus done they were unquestionably intended to refer to the entire sale begun upon October the 14th continuing upon October the 15th, and were not intended to be limited as referring to the one day of the sale only.

It is next claimed that the statutory form of the deed requires that the date upon which the land is exposed or offered for sale shall be set forth therein. When applied to the date that the land was sold this is correct, but we find nothing in the form to indicate it was intended that every day the land was exposed for sale should be included in the deed; for instance the statute provides if there be no bid for any tract offered the treasurer shall pass it over for the time being and shall reoffer it at the beginning of the sale the next day. Was it intended, where land was offered on the first day, with no bidder, and reoffered upon the second day and sold to a private individual, that the deed should disclose the date upon which it was first offered? We do not think so, otherwise the form would have so provided. The same rule unques-

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tionably applies when the land is bid in for the county, otherwise the act would have provided for recitals to that effect, the same as it does in the form for other recitals when it is stricken off to the county. They are, that at the sale so held as aforesaid no bids were made for the property and no person or persons having offered to pay the said taxes, and the treasurer having become satisfied that no sale of property could be had, etc. These provisions are in the form of the deed and had it been intended, where the sale was to the county, that the deed should set forth that the property was offered for sale upon two different dates, carried over, reoffered, etc., we think that the form of the deed would have thus provided; not having so provided in the deed, although other matters pertaining to the county buying, etc., are fully set forth in the form, we cannot assume that the legislature intended to require more than is called for in the form of the deed in order to make it *prima facie* evidence of certain matters. To hold otherwise would be in direct conflict with the provisions of the statutes which say that a deed, in substantially this form, shall be *prima facie* evidence of certain facts.

It is true, had the deed disclosed the sale was to the county upon the first day, it would have shown a violation of the statute, and been void upon its face, for the reason that the county cannot buy upon the first day of the sale; but in this case it is only by assuming that the property was not offered for sale upon the first day of the sale, and was exposed for the first time upon the second day, that the deed can be declared void upon its face. In other words, it is only by presuming that the law was not complied with where the deed is silent upon the question, that this result can be reached. Such a presumption would be to nullify the effect of the statutes which say that a deed in a certain form shall be *prima facie* evidence of certain facts. Such a presumption is also in conflict with the declarations in the deed to the effect that the sale was

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conducted in substantial conformity with the requirements of the statutes in such case made and provided, and that the property was stricken off to the county and certificate issued, etc., in accordance with the statute in such case made and provided. These conclusions are sustained by the reasoning in *Knowles v. Martin,* 20 Colo. 393, 38 Pac. 467, where the tax deed showed a sale to the county upon the 14th of June. The court recognized that the treasurer had a right to sell to the county upon the second day of the sale. The deed did not disclose whether the 14th of June was the first or the second day of the sale. Therefore the deed upon its face did not affirmatively show that the sale occurred upon the first day. Under these circumstances the party attacking it introduced extraneous evidence showing that the 14th of June was the first day of the sale. The party relying on the tax deed offered the tax sale record to show that in fact the property had been sold on the 15th of June; held, that as the deed upon its face did not show that the land was sold upon the first day of the sale, and it being necessary for the opposing party to resort to extraneous evidence to show what was the first day, that it was error to exclude the evidence offered by the tax title claimant to show that the land was sold upon the 15th of June, or, the second day of the sale.

In *Crisman v. Johnson,* 23 Colo. 265, 47 Pac. 298, 58 Am. St. 224, it was claimed that the tax deed was void on its face because it recited a sale of a large number of noncontiguous lots *en masse.* In commenting upon this the court said:

"This claim is based principally upon the recital in the deed of a sale of a large number of lots, not numbered consecutively. This is undoubtedly some evidence that the lots are not contiguous, but we think it is not sufficient evidence to overcome the presumptions in favor of the validity of the deed, and the regularity of the proceedings, and particularly of the recitals that the lots were exposed to public sale in substantial conformity with the statute in such case made and provided. It is true this latter statement is the statement of a conclusion of law,

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but the deed follows closely the language of the statute in this respect, and the statement, having the sanction of legislative authority, should be given weight by the court."

This conclusion is likewise applicable to the facts here.

In *Lovelace v. Tabor M. & M. Co.*, 29 Colo. 62, 66 Pac. 892, the sale was to the county. The portion of the deed involved was practically the same as that under consideration, it reads:

"And whereas, the treasurer of the said county did, on the 20th day of November, A. D. 1894, by virtue of the authority vested in him by law, at the adjourned sale begun and publicly held on the 7th day of November, A. D. 1894, expose to public sale, at the office of the county treasurer, in the county aforesaid in substantial conformity with the requirements of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest and costs then due and remaining unpaid on said property; and whereas, at the time and place aforesaid, Boulder county, of the county of Boulder and state of Colorado, having offered to pay the sum of two dollars, and forty-three cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on said property, for all of the above described property, which was the least quantity bid for, and payment of said sum having been made by it to the said treasurer, the said property was stricken off to it at that price."

It was claimed that the form of this deed disclosed that the county was a competitive bidder at the sale. It was held that this form of deed was substantially as prescribed by statute, 2 Mills' Annotated Statutes, section 3901, and varied only to show the truth of the transaction, in substance, that it was therefore *prima facie* evidence that the sale was conducted in the manner required by law, unless the recitals therein showed to the contrary, but that they did not indicate that the county was a competitive bidder; hence, this form of deed was sustained. We call attention to the fact that the one now under consideration is much better in form than the one last set

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forth, and while the identical question under consideration here appears not to have been raised or considered in the former case, this principle was involved, and in the opinion it is said, that the deed did not indicate that the county was a competitive bidder; that the recitals therein did not show that the sale had not been conducted in the manner required by law; that a recital that a bid for the county by the treasurer for the whole of the tract does not show that it was a competitive bidder; that a recital like this, not negatived, would be presumed to establish the fact that the county was the only bidder, because such bid was the only one which the treasurer was authorized to make on behalf of the county. Applying this principle here, it follows that the treasurer, upon the second day of the sale, after becoming satisfied that no more sales could be made, had the right, in case the property had been previously offered upon the first day, after again offering it for sale, with no bidders, to have it stricken off to the county in the manner provided by statute, in which case where the deed, as the form provides, is silent upon the question of the former offers and result thereof, it must be presumed that it was offered upon the first day of the sale but not sold. In the *Tabor M. & M. Company* case, *supra,* the deed does not state or show that the land was offered for sale other than the day when it was stricken off to the county, and to now hold the deed under consideration invalid for that reason, would be to overrule the former case wherein the deed involved the identical question now under consideration.

We are not unmindful of our opinion in *Bryant v. Miller,* 48 Colo. 192, 109 Pac. 959, wherein a deed similar in form to the one under consideration was declared void on its face for the reasons now being considered, thereby making a direct conflict between the opinions in the two former cases. Neither of these cases can be distinguished from this so far as the form of the deed is concerned upon this question. If we are to follow the announcement in the *Miller* case, this deed should be held subject

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to the objections urged. After more mature deliberations, however, by the court *en banc,* we are of opinion that the *Miller* case is subject to criticism: First, in assuming where a sale is to the county upon the second day of the sale, that the deed must recite that the land was offered upon the first day and again reoffered upon the second. Second, in assuming that the form of the deed discloses that the property was not offered for sale upon the first day. Third, in assuming that the deed must set forth therein the different dates upon which the property was exposed for sale. Fourth, in assuming that the deed must disclose the first day upon which it was offered and each and every day thereafter, when it was offered, where the county is the purchaser. In these respects it is in conflict with the views herein expressed and to that extent must be overruled.

We are aware that since the announcement in *Bryant v. Miller, supra,* it has several times been cited as authority upon this and other subjects by this court, as well as the Court of Appeals. An examination of those cases will disclose it was cited and accepted as a matter of course without further investigation. They also show that the ultimate conclusions, in most of them at least would have been as they are for other reasons as therein disclosed; but above and beyond all this is the more important question of being right, and unless there is some particular reason why an erroneous ruling should be followed no court should be above reversing itself when it has been clearly demonstrated that it has made a mistake in one of its conclusions, and especially so where the result has been to disregard a legislative enactment, as well as the rules announced in former opinions of this court involving somewhat similar questions; in such case the precedent should not be blindly followed simply because it has been announced.

For the reasons stated the judgment is reversed and the cause remanded.

Reversed.

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Decision *en banc*.

CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT dissent.

[No. 6936.]

PHIPPS, ET AL. V. CITY AND COUNTY OF DENVER.

1. APPEALS—*Questions not Presented Below.* Where in condemnation proceedings no objection is made below to the damages awarded in respect of land taken, this court will not, on appeal, review such award. (208)

2. CONSTITUTIONAL LAW—*Eminent Domain.* The provision of § 6592 of the Revised Statutes that in the opening of an alley the benefits shall be paid by the owners of property in the block abutting on the alley, is not in violation of § 15, art. II of the constitution. (215)

3. EMINENT DOMAIN—*Statute Construed.* It is not a necessary deduction from the proviso to § 6592 Rev. Stat. that the benefits to each owner in the block through which an alley is opened will be identical with the damages assessed to him for so much of his lot as is taken. That depends upon whether they are in fact the same, when ascertained in the manner prescribed by the statute. (209)

It is not the purpose of the statute that the owners of the lots abutting upon the alley should bear the cost of the improvement in equal proportions; each of such property owners must bear some portion of the burden, but the ascertainment is not to be made upon the frontage merely, but according to the actual benefit occasioned to the property, as nearly as this can be ascertained. (215, 216)

Where the commissioners assessed no benefits against the corner lots, it was held that their report was a departure from the statute, and that the court was justified in a modification of the award in this respect. (211)

4. ——*Powers of the Court.* §§ 6592-6597 of the Revised Statutes are to be taken together. Thus construed they confer upon the District Court power to modify, recast, or annul, any assessment, and do everything necessary to make a true and just appraisement, according to the principles of the statute. (210)

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Where the boundaries of the district to which the assessment is limited, as by the proviso to Rev. Stat. § 6592, the court may, if the report departs from the statute, amend it in this respect, or may refer it to the same or another commission. (210)

So where it appears that the commissioners acted under a misapprehension of the law. (211)

5. ——*Objections to Report—Effect.* Proceedings for the opening of an alley. The commissioners omitted to assess benefits against the corner lots, though abutting upon the alley. The owners of these lots made no objection to the report. *Held* that objections made by the holders of other lots in the block entitled the court to revise and correct the report in this respect. (212)

Appeal from Denver District Court.—Hon. GREELEY W. WHITFORD, Judge.

Mr. EDWARD L. SHANNON, Mr. ROBERT GIVEN, for appellants.

Mr. I. N. STEVENS, Mr. J. A. MARSH, Mr. G. A. LUXFORD, Mr. A. T. MONSON, for appellee.

Mr. JUSTICE HILL delivered the opinion of the court:

This action was by the city and county of Denver to acquire, by right of eminent domain, a tract of land for an alley sixteen feet in width off of the rear ends of the two rows of lots situate between Broadway and Lincoln Streets, and Tenth and Eleventh Avenues, in the city and county of Denver; also, to have the special benefits assessed to the abutting owners, etc. The appellant Phipps owns the corner at Eleventh and Lincoln, being forty-three feet facing on Lincoln, and one hundred thirty-three feet along Eleventh Avenue. The appellant Dean owns the corner at Eleventh and Broadway, being forty-three feet facing on Broadway, and one hundred thirty-three feet along Eleventh Avenue. The appellant Hinkley owns the corner at Tenth and Lincoln, being one hundred ten feet facing on Lincoln, by one hundred thirty-three feet deep along Tenth avenue.

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The commission appointed for the purpose assessed the damages for each tract taken at a specified sum. It found that no damage would result to any remaining property by reason of the taking. It also found that certain land in the block would be specially benefitted by the opening of the alley, and assessed against these owners the total amount of the damages awarded by reason of the taking. The assessments as benefits were against the owners of all the land remaining in the block abutting on the proposed alley, except that portion of each corner forty-three feet wide facing on the proposed alley. There was no assessment by the commission as benefits against any of the four corners of this depth.

Certain landowners filed objections to this report, protesting against the benefits assessed against them, to the amount awarded for the land taken, and to the report as a whole, alleging, that the awards for the land to be taken, and the benefits, had not been calculated upon actual value and benefits, but had been mathematically adjusted, so that those alleged to have been more damaged than benefited must be paid by those alleged to have been more benefited than damaged, and that it appears from the report that the object sought to be consummated was to compel certain landowners owning the inside portion of the block to pay the owners of the outside portions any excess in value over benefits which the commission concluded to allow.

Default was entered against certain respondent landowners who failed to appear. Thereafter, the court heard evidence pertaining to the objections, sustained some, rejected some, made certain findings of fact, and amended the report of the commission, by decreasing the assessment of benefits against the inside lots, and assessed as special benefits against the corners owned by Dean, Phipps, and Hinkley, the same amount per lineal foot facing on the alley as against the other abutting owners in the block. This made the special benefits to each tract the same amount as the damages for

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the portion taken. Decree was entered accordingly, from which these appellants have appealed.

Numerous errors are assigned; many need not be considered as they pertain to the lands of owners who are not complaining and which alleged errors in no manner affect the rights of these claimants.

It is claimed that the court is not clothed with authority to hear and determine the issues raised by the objectors pertaining to the amount of damages awarded or benefits assessed; that such questions must be determined by the commission, or, if desired, by objectors, by a jury. The first portion of this contention is not before us. The record discloses that the damages for the land taken were fixed by the commission; that no objections were made thereto, and that this portion of the report was approved by the court. The commission also found and reported that no damage would result to any remaining property by reason of the taking. There was no objection to this finding, which was likewise approved. Section 15 of article II of our constitution provides, "That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law." In *Tripp v. Overocker,* 7 Colo. 72, it was held that this requirement of the constitution is imperative. We have no criticism to offer pertaining to this holding. It is sufficient to call attention that both of these facts were determined by a commission; that no objections were made thereto, and that their action in this respect was approved by the court.

It is next claimed that section 6592 Revised Statutes, 1908, violates section 15 article II of the constitution. It is urged that because the assessment of benefits authorized by this section are fixed at a similar amount as the damages assessed for the land taken, that the appellants receive nothing for the land taken. While it

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is true that this section fixes the territory which is to be held as being specially benefitted by the opening of an alley, and provides that the cost of the improvement shall be assessed to the owners thereof, for reasons hereafter stated, it does not necessarily follow that the benefits to each owner are to be fixed at a similar amount as the damages assessed for the land taken; that depends upon whether they are the same when they are both fixed in the manner provided by law. This question of an improvement district was under consideration in *Alexander v. Denver,* 51 Colo., 140, 116 Pac. 342. It was decided adversely to appellants' contention. For the reasons in the opinion stated, it is unnecessary to reiterate them here.

It is conceded that the assessments of benefits against the remainder of the lands of the appellants occasioned by the opening of the alley was by the court, and that in this respect the court enlarged the district which the commission found would be benefited. The right of the court to do either is challenged. The case of *Jones v. Town of Lake View,* 151 Ill., 663, 38 N. E., 688, and other Illinois cases are relied upon to support this contention. This case holds that the subject of what land should or should not be assessed benefits is not a question for a jury; but in commenting upon this question at page 681 the court said:

"It is unavoidable, under the system prescribed by the legislature, that a very large discretion is committed to the commissioners authorized to apportion the assessment upon the property benefited. This discretionary power they exercise in determining not only what the benefits to the property affected are, but also in determining what property is benefited by the proposed local improvement. The exercise of the power to determine what property shall, or shall not, be included in the assessment, is not made the subject of review by trial by jury. The court may undoubtedly supervise, upon proper objection, the exercise of the power by the commissioners, and, indeed, as we have already seen (sec. 33, art. 9, ch. 24, R. S.), the court is given power, at any time before

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final judgment, to modify, alter, change and annul, or re-cast any assessment, and to take all such proceedings and make all such orders as may be necessary to make a true and just assessment according to the principles of the act. And in cases of fraud, corruption, oppression, or departure from the principles governing in like cases, it would be the duty of the court to set it aside, or to cause the same to be so changed as to make a just and true assessment. This, however, is to the court, and with which the jury have nothing to do."

We think like powers as stated by the Illinois court were intended to be vested in our District Courts. Section 6593 R. S. provides that when the commissioners shall have viewed the property and assessed the value, damages and benefits, they shall make return of such assessments in writing to the court, etc., giving certain notices to owners, etc. Section 6594 provides that any person interested in any real estate to be affected by such assessment of value, damages or benefits, may appear within a time to be fixed by the court, etc., and file objections to the report. Section 6595 provides upon demand for jury trials, etc. Section 6596, that the trial shall be conducted in like manner as in other civil actions, etc. Section 6597 provides that the court, before which any such proceeding may be pending, may at any time before final judgment for good cause shown, modify, alter, change, annul or confirm the report of the commissioners, or may order a new appraisement and assessment as to any or all of the real estate thereby affected, by the same commission or another. These sections must be construed together, and when thus done, and effect is given to all of them, we are of opinion that our District Courts are possessed with like authority as that pointed out by the Illinois court; and when the legislature, as in this case, has fixed the boundaries of the district, the court has the right and should amend the report of the commission to comply therewith, or refer it to that or another commission, for that purpose. Other

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Illinois cases, and those from other states which pertain to improvement districts created by boards of public works, park commissions or councils of cities, etc., are not in point. In such cases these boards, or the city council approving their action, became a quasi court for the purpose of determining these questions. There are usually certain restrictions placed upon them by the action of a certain per cent of the property owners by appeal to the court, etc.

In the case at bar objections were filed to the report of the commission. They include the question of the lands benefited by the improvement and the amounts to be assessed therefor. No demand was made for a jury trial. Under such circumstances it is the duty of the court to consider and pass upon all the questions covered by the objections. Whether it was justified in modifying, altering, or changing the report of the commission as authorized by section 6597, *supra,* is another question that could only be determined when the objections to the report filed for this purpose were considered.

Many authorities are cited as to the effect of the report of such a commission when objections are filed thereto, the weight to be given it as evidence, and what facts must be disclosed before the court is justified in setting it aside, but they all agree that in case the commissioners have acted under misapprehension of the law the court is justified in changing their report to comply therewith. Section 6592, R. S. provides, "That, in the opening of an alley, the benefits shall be paid by the owners of the property in said block abutting on the proposed alley." The report of the commission is in conflict with this section inasmuch as it failed to assess any benefits against the four corners of this block forty-three feet in depth where they face this alley. If this act is constitutional (which is challenged and will be considered later) it is self-evident that the court was justified in changing the report of the commission in this respect. *P. & A. V. R. Co. v. Rudd,* 5 Colo 270; *State v. District*

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Court, 80 Minn. 293, 83 N. W. 183; *Jones v. Town of Lake View,* 151 Ill. 663, 38 N. E. 688; *Virginia & Truckee R. Co. v. John Henry,* 8 Nev. 165; 15 Cyc. 906; *In re Brooklyn El. R. Co.,* 80 Hun, 355, 30 N. Y. Supp. 131; *In re Chapin,* 84 Hun, 490, 32 N. Y. Supp. 361.

We cannot agree with counsel for appellants that because they filed no objections to the report of the commission that the court was without jurisdiction to consider the question of benefits to their lands adjoining the proposed alley. The objections filed to the report by other landowners in addition to the question of the damages for their land taken, and the special benefits to the residue and other matters, were directed against the entire report and specially covered the question of benefits to the lands of the appellants. The fifth objection, among other things, included the allegation that it clearly appeared from the report and award that the purpose and object sought to be consummated was to compel the owners of inside portions of the block to pay the owners of outside portions any excess in value over benefits which the commission concluded to allow. This it was alleged was unlawful, etc. It was further alleged that this method was not calculated upon actual values and benefits, but was thus mathematically adjusted, so that those alleged to have been more damaged than benefited must be paid by those alleged to have been more benefited than damaged. The record discloses that appellants were notified of the objections and appeared, cross-examined witnesses, had their own witnesses sworn, examined and tried the very questions which they now say the court had no right to go into. We are of opinion that the proceedings were sufficiently regular, including the objections, to vest the court with jurisdiction to go into these questions, and that the appellants ought not now be heard to complain concerning their consideration. *Scheerer & Co. v. Hutton,* 7 Cal. App. 524, 94 Pac., 849.

It is claimed that section 6592 R. S. in so far as it provides that benefits shall be assessed only against

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owners of property abutting on the proposed alley is unconstitutional, for the reason that no one's property shall be assessed for more than its share of benefits arising from any public improvement. With this principle we agree, but it is for some tribunal to determine the benefits as well as the district to be benefited. It is claimed that if the opening of this alley is a public improvement, for public use and of public benefit, that there must be benefits accruing to the city at large, otherwise that the opening of the alley could not be considered a public improvement, nor this proceeding maintained; that as the benefits should be assessed wherever benefits are received that the city at large receives benefits from any public improvement, and should pay its share therefor. It is claimed that there is no more reason why the abutting property owners should pay for the opening of an alley than that the abutting property owners only, should pay for the opening of a street; that both are public improvements, and both involve the condemnation of private land for public use; that inasmuch as in the opening of a street the commissioners are authorized to assess against the city the amount of benefits to the public generally, and the remainder against the owner of owners of property specially benefited, that there is no reason why such limitation and restriction should be placed upon the opening of an alley as provided in this section, for which reason it requires an unjust assessment, for if the city be prohibited, as the statute provides, from paying its share of the benefits to the public generally, it follows that the abutting property owners are required to make up this amount by submitting to a larger assessment than is properly their share, and that in this respect it violates section 15 of article II of the constitution. If this line of reasoning were controlling it could be answered by calling attention to the fact that conditions pertaining to the use of a public street, and an alley, are not altogether the same. Generally speaking, an alley is primarily for the use and benefit of the owners of the lots abutting thereon, and for which

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reason, as well as its location, is not of the same benefit to the public generally as is a street. *Paul v. City of Detroit,* 32 Mich. 108; 28 Cyc. 833; 2 Cyc. 133; *Face v. Ionia,* 90 Mich. 104, 51 N. W. 184; *Bagley v. People,* 43 Mich. 355. 5 N. W. 415, 38 Am. Rep. 192; *Beecher v. People,* 38 Mich. 289, 31 Am. Rep. 316.

The authorities cited by the appellants pertaining to their damages for the land taken, and the right to assess or tax the residue a certain amount, as benefits, to pay for the improvements were evidently considered in *Alexander v. Denver,* 51 Colo., 140, 116 Pac. 342, where we recognized there was some conflict of authority upon this question. The district to be benefited by a public improvement is always a question of opinion, and its boundaries to some extent must be arbitrarily fixed. It is for some tribunal to draw the line. In *Londoner v. Denver,* 52 Colo., 15, 119 Pac. 156, we held that a park is a special benefit to the locality where it is established, and that its cost to the extent of the benefit, may be assessed against the property specially benefited, and in such case where a district has been regularly established and held to be specially benefited, that the only constitutional right of the property holder is to be heard upon the apportionment of the tax. In *Spencer v. Merchant,* 100 N. Y., 585, 3 N. E. 682, affirmed by the Supreme Court of the United States in 125 U. S., 345, 31 L. Ed. 763, 8 Sup. Ct. 921, it was said, "The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself." Our legislature in its wisdom has seen fit to fix the boundaries of the district as being specially benefited by the opening of an alley, by providing that the benefits shall be paid by the owners of the property in the block abutting on the proposed alley. In the fixing of this amount, this proviso, as stated elsewhere in the section, must be construed to mean that it shall be apportioned among the several owners in the ratio that each is specially bene-

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fited upon account of the improvement, and when this is done, we are not convinced that either by mistake or intention the legislature has imposed a contribution unsupported by any public benefit, or out of all proportion to the possible benefit. In such case with the above exceptions, it is for the legislature to determine, and we do not think the act vulnerable to the constitutional objection urged. *Alexander v. Denver,* 51 Colo. 140, 116 Pac. 342; *Londoner v. Denver,* 52 Colo. 15, 119 Pac. 156; Hamilton on Special Assessments, § 171; *Minor v. Sheriff,* 43 La. Ann. 337, 9, South 49; *Bauman v. Ross,* 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; *Hagar v. Reclamation District No. 108,* 111 U. S. 707, 4 Sup. Ct. 663, 28 L. Ed. 569; *Davidson v. New Orleans,* 96 U. S. 97, 24 L. Ed. 616; *Providence Bank v. Billings,* 4 Pet. 517, 7 L. Ed. 939; *French v. Barber Asphalt Paving Co.,* 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879.

We are unable to approve that portion of the decree which makes the assessment equal against all the owners of properties abutting on the proposed alley, regardless of the difference in the special benefits to be received. In our opinion the statute is not susceptible of this construction, and while the section means that the special benefits shall be paid by the owners of the property in the block abutting on the proposed alley, we do not think it was intended that the special benefits to be derived by each owner should be disregarded in fixing the assessment; that all should bear some portion of the burden was unquestionably intended, but to hold that the owners should bear the burden equally in proportion to their frontage would be to disregard the question of special benefits to each tract. If thus intended it would relieve the commission or court from making an assessment upon account of special benefits, as it would simply be a matter of mathematical calculation, which is certainly not authorized by the section. If it thus read it would then require a consideration of the constitutional question so ably urged by attorneys for

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the appellants, involving that class of cases. That it was never thus intended is apparent not only from the language used, but the extreme injustice it might work in certain cases. For instance, one landowner might own a lot two hundred feet in depth with a frontage upon the alley of fifty feet, another might own a lot ten feet in depth with a frontage upon the alley of twenty feet. The assessment against the one might be fair and equitable, in proportion to the amount of special benefits received, yet when applied to the other might be greatly in excess of the entire value of the residue of the property owned by him. This principle, to a certain extent, applies to the owner of a corner lot who, before the improvement, has access to his property from two sides and is usually burdened with improvements therefor, while the owner of an inside lot before the improvement has access thereto only from its front and his street improvements are usually limited accordingly. The inconvenience to the owner of the corner for want of an alley upon account of his surroundings must be less than that of his neighbor with his inside lot, for the same reason the alley must, of necessity, be of greater benefit to the inside lot owner than to his neighbor on the corner.

We cannot agree that the evidence sustains the conclusion that the owner of the corner lot is benefited to the same extent as the owner of the inside lot upon account of the opening of the alley. That the owner of the corner lot is benefited, to some extent, is not only contemplated by the statute, which says the benefit must be assessed against all frontage, etc., but we think must be conceded for reasons, among others, that it gives him access to his property from three sides, and the very fact of the existence of an alley in a block, if it is owned by different people, must, to a certain extent, be of some benefit to the owners of all property in the block, and we think is a special benefit to the owner of lands facing thereon, left after that for the improvement is taken. These owners the statute says shall be

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assessed therefor. Not only is their land benefited in the way of ingress and egress, but in the question of light, air and other conveniences where buildings are constructed, or for such prospective use in case they are vacant. We are of opinion this section means that, in assessing these benefits, all these matters shall be taken into consideration with a view of arriving as nearly as possible at a correct apportionment of the entire amount of the cost of the improvement between the several tracts of land facing thereon, all of which are specially benefited thereby. As to what this apportionment should be between the owner of the corner lot or lots and his neighbor in the center of the block, and as to where the line or lines should be drawn or distinction made, as to the difference in the burden to be borne, we do not think it is proper for us to now determine. That a distinction must be made in these respects, and the line or lines be drawn somewhere is readily apparent in order that a just and equitable distribution of the burden be made, but that can only be done when evidence is taken and considered for that purpose under a correct conception of the law.

Inasmuch as the commission adopted an erroneous conclusion one way and the court likewise went to the extreme the other, it makes it impossible for us to accept either, for which reason the judgment, in so far as it affects the appellants on the question of benefits, is reversed, and the cause remanded for the appointment of another commission and for a new trial upon that question only, in harmony with the views herein expressed.

Reversed.

Decision *en banc.*

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[No. 7047.]

NEW BRANTNER EXTENSION DITCH CO. v. KRAMER ET AL.

1. QUIETING TITLE—*Water Rights.* In this jurisdiction a bill to quiet title to a water right, and enjoin interference therewith will be entertained. Vague and uncertain provisions of the contract under which the plaintiff claims are no bar to the relief. (222)

2. CONTRACTS—*Construction.* The entire instrument is to be considered, and effect given to every word thereof, if possible. (223)

If conflict in its provisions appears the circumstances surrounding the parties and attending the execution of the instrument, and the construction placed upon it by the parties, in the performance of it, before controversy arose, may be inquired into. (223)

3. ——*Effect of Statutory Provision—Statute Construed.* The provision of Rev. Stat. § 7026 that in the sale of water "every inch shall be considered equal to an inch square under a five inch pressure" &c., is not controlling, in the construction of a contract for the enlargement of a ditch, and prescribing a volume of water to which the owners, and those bearing the expense of the enlargement, shall respectively be entitled, unless this was the intention of the parties. (230)

4. WATER RIGHTS—*Measurement of Water—Inches.* The cases as to the meaning of the word "inch", in the measurement of water, examined, and the indefiniteness of the term, disclosed. (226, 227)

5. ——*Changing Point of Diversion.* Leave to change the point of diversion can be obtained only by pursuing the course prescribed by the statute (Rev. Stat. §§ 3226-3229.) (231)

Appeal from Denver District Court.—Hon. H. C. RIDDLE, Judge.

Mr. JOHN T. JACOBS, Mr. H. N. HAYNES, Mr. PLATT ROGERS, for appellant.

Mr. J. C. HELM, for appellees except Denver.

Mr. MILTON SMITH and Mr. I. N. STEVENS, for City and County of Denver.

Mr. C. J. BLAKENEY, for appellees.

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Mr. JUSTICE HILL delivered the opinion of the court:

A general demurrer to the amended complaint was sustained. The plaintiff elected to stand upon this complaint and brings the case here for review. The complaint is voluminous. In substance, it sets forth the history of a certain irrigation canal, including its enlargements and extension by the predecessors of the plaintiff, under a contract with certain of the defendants, and the heirs, grantors, etc., of others, who were the former owners of the canal. It is alleged that under this contract the possession and use of the canal in perpetuity was conveyed and turned over to the predecessors of the plaintiff, their assigns, etc., under certain conditions, among which it was provided that there should be at all times left in the canal, for the use of the defendants, their heirs, grantors, etc., during the season when water is carried, etc., at certain places, etc., not less than certain amounts of water. A copy of the contract is set forth, relying thereon, a full compliance with its terms, the expenditure of large amounts, the development and irrigation of a large tract of land, etc., are alleged. It is then alleged that each year thereafter, and since 1880, that the waters carried through the canal were of certain amounts, and with the exception of certain amounts delivered to the defendants or their predecessors, has been used for the irrigation of lands belonging to the predecessors of the plaintiff, and the plaintiff's stockholders, upon whose behalf the action is also brought, in the aggregate of about six thousand acres. It is alleged that the term "inches of water" at the time of the execution of the contract, was an indefinite phrase popularly used to designate the number of square inches in a cross section of flowing water, without reference to grade, etc., and that the phrases "288" and "2592" used in the contract were selected to indicate twice the number of square inches in a cross section of a square foot of flowing water. Numerous allegations of facts are set forth

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as tending to show what the parties meant by the terms used concerning the different amounts of water to be supplied the original owners of the canal, when to be supplied, the uses to be put, etc. The alleged uniform usage and practice followed by the parties and their successors ever since the execution of the contract, and up to just before the bringing in this action are set forth. These are intended to disclose the construction placed upon the contract by the parties to it, and their grantors, etc., at and from the time of its execution down to just before the bringing of this suit. These alleged facts include the assent and acquiescence of all parties at any time interested to a certain construction which gave to the defendants and their predecessors the right to have delivered to them, if and when needed, for domestic purposes and the irrigation of certain lands, not more than eighteen cubic feet of water per second of time, and to the predecessors of the plaintiff, and its stockholders, the possession of the canal and the right to all waters to be obtained therein by virtue of its original construction, enlargement, decrees secured therefor or otherwise, save and except the amount required to meet the needs of the defendants, etc., as called for in the contract, not to exceed the maximum amount of eighteen cubic feet per second of time. It is alleged that such facts, consent acquiescence, and recognition of all parties, have continued and been maintained for twenty-nine years last past. It is then alleged that notwithstanding all of these facts, just prior to the bringing of this action, and never before, most of the defendants wrongfully claim that by virtue of said contract, and the rights reserved thereby, although contrary to its intent and meaning and the uniform construction placed thereon by usage, etc., they, in the aggregate, are entitled to more water in the canal than belongs to them; that they wrongfully claim to own certain portions of the water, and interest in the canal which in fact belong to the plaintiff and its stockholders; that they cannot agree among themselves to the extent of such ownership in the aggregate; that some claim it is

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one amount, viz, 67.5 second feet, others a different amount, and others still a different amount. In addition to these alleged claims, sundry and different threats and alleged wrongful acts of the defendants are set forth, such as the different individual claims of ownership, the threat to sever the water rights under such claims from the land under the ditch, to sell and convey same with intent to cause it to be changed in point of diversion to other ditches, and without sale to make changes of all water decreed to said ditch by virtue of its first three priorities, and to claim 20.7 second feet out of its fourth priority, that if the defendants are not restrained the plaintiff and its stockholders will suffer irreparable injury, and be deprived of water of great value, etc., and that unless restrained the defendants severally will, as some of them have threatened, execute written conveyances or instruments wrongfully purporting to sever all water rights above set forth from the lands to which they are appurtenant, and will assert and claim the right to convey in fee simple senior and prior appropriations of said ditch, in the aggregate to the extent of 67.5 second feet, or at least of 47 second feet, and will cause the instruments to be placed of record, etc., thereby further clouding the title of plaintiff as trustee for its stockholders, all of which will depreciate the value of its property and stock, and unless restrained and plaintiff's title to its water be determined, the defendants will severally institute suits to obtain decrees, change point of diversion, or cause their proposed vendees, under the said proposed conveyances, to institute such proceedings severally, which will cause plaintiff and its stockholders great and irreparable damages, unnecessary loss, a multiplicity of suits, etc. The prayer is to restrain the sundry acts as threatened, and that decree be entered defining and construing the respective rights of plaintiff and defendants; that the interests of the defendants and the plaintiff be decreed to exist, as alleged and that the plaintiff's title be forever quieted, and for general relief.

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Stripped of its historical narrations and allegations of evidence the complaint attempts to state a cause of action as a bill in equity to quiet the title of the plaintiff in and to its use, under certain conditions, for certain purposes, of a canal and the right to certain portions of the water to be derived through the same. That a bill of this character will lie to quiet title to water rights, and to enjoin any interference with them, is well settled in this jurisdiction.—*Kimball v. Northern Colo. I. Co.*, 42 Colo. 412, 94 Pac. 333; *Town of Sterling v. Pawnee D. E. Co.*, 42 Colo. 421, 94 Pac. 339, 15 L. R. A. (N. S.) 238; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. 175, 118 Am. St. Rep. 95; *Gutheil P. I. Co. v. Montclair*, 32 Colo. 420, 76 Pac. 1050; *Bessemer I. D. Co. v. Woolley*, 32 Colo. 437, 76 Pac. 1053, 105 Am. St. Rep. 91; *Grand Val. I. Co. v. Lesher*, 28 Colo. 273, 65 Pac. 44.

The plaintiff has attempted in its pleading to deraign its title by setting forth the contract under which it claims, and alleging the facts and circumstances under which it was executed and the construction given to it by all parties to or interested in it for twenty-nine years following its execution, in order to show what was intended by the language used. If by so doing it has alleged facts which disclose that it has no right or title to that which it claims the demurrer was properly sustained. On the other hand, if there is sufficient material facts alleged to show that it is entitled to any portion of that which it claims, when, considered in connection with the alleged acts of the defendants it was not subject to a general demurrer.

The defendants contend: First, that the contract is unambiguous, and that its plain language discloses that the plaintiff does not own and was not entitled to the use or enjoyment of that which it claims, and inasmuch as it bases its title on the contract, the execution of which it alleges, for this reason the demurrer was properly sustained. Second, that if in disregard of the terms of the contract the plaintiff claims to hold the water by adverse possession account of appropriating

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it to its own use for twenty-nine years, it cannot do so, because by the terms of the contract the plaintiff has had sole possession and control of the ditch, which constituted a trust estate, as trustee, which, under such circumstances, prevents it from acquiring title as against the defendants, and further because there is no allegation that the defendants acquiesced in the breach of trust by the trustee and for this reason the demurrer was properly sustained.

In considering the first question it is not our intention to place a construction upon the contract, or to consider its meaning further than to determine if the court was right in holding that it was unambiguous, and that it did not require a consideration of the facts and circumstances under which it was executed or the construction thereafter given it, in order to ascertain what was intended. In considering the meaning to be given a written instrument it is elementary that the entire instrument should be considered, and that effect should be given to the language used in each and every part thereof, if possible to do so. If an apparent conflict be found which, of necessity, would tend to make its meaning ambiguous or if any particular portion is ambiguous, of doubtful meaning, or susceptible of two constructions, the extrinsic circumstances surrounding the parties and attending the execution of the instrument may be looked to in order to ascertain what was intended.—*St. L. & D. L. & M. Co. v. Tierney,* 5 Colo. 582; *McPhee v. Young,* 13 Colo. 80, 21 Pac. 1014; *Wyatt v. Irrigation Co.,* 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280; *True v. Rocky Ford Co.,* 36 Colo. 43, 85 Pac. 842; *Fearnley v. Fearnley,* 44 Colo. 417, 98 Pac. 819; *Burmister & Sons Co. v. Empire G. M. & M. Co.,* 8 Ariz. 158, 71 Pac. 961. In such cases it is also proper to inquire as to the construction the parties put upon the contract in its performance, up to the time the dispute arose. *Stewart v. Austin,* 50 Colo, 248, 115 Pac. 516; *Wyatt v. Irrigation Co.,* 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280; *McPhee v. Young,* 13 Colo. 80, 21 Pac. 1014; *Buckhorn Co.*

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v. Consolidated Co., 47 Colo. 516, 108 Pac. 27; *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110; *Chicago G. W. Ry. Co. v. Northern P. Ry. Co.*, 101 Fed. 792, 42 C. C. A. 25; *Grand Valley I. R. Co. v. Lesher*, 28 Colo. 273, 65 Pac. 44; *Animas Ditch Co. v. Smallwood*, 22 Colo. App. 476, 125 Pac. 594; *North Fork Water Co. v. Medland* (C. C.) 187 Fed. 163.

The contract was evidently intended as a mutual benefit to all parties. It sets forth in substance that the first parties owned the Brantner ditch six miles long, and privileges belonging thereto; that second parties are associated to procure water for themselves and others and desire to use the ditch, and its right of way, to carry water through same to its present terminus, and thence to other lands, by extension to be hereafter constructed. First parties grant to second parties and assigns the right of way to conduct water through said Brantner ditch for irrigation, domestic, and other purposes, to such extent, and in such amount as may become practical, within capacity of said ditch when enlarged, after leaving in it at all times for use of persons constituting first party, not less than two hundred eighty-eight inches of water for each undivided ninth interest measured under five-inch pressure, so that each of said persons and assigns, etc., during irrigation season when water is flowing through said ditch, can by means of lateral ditches, at proper places, take therefrom at any and all times, not less than two hundred eighty-eight inches of water, so measured, for each ninth interest, and in like ratio for whatever interest any such first party or assigns may control. This transfer is made on certain conditions mentioned in the contract to be faithfully kept, etc. In consideration of the grant and conveyance the second parties covenant, prior to April 15th, 1880, to repair and clean out the ditch from its head to present terminus, and have same in good condition for use during the irrigation season of 1880, also before May 15th, 1880, to enlarge the ditch from head to present terminus to not less than twenty feet wide and three

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feet deep, or fifteen feet wide and four feet deep, so that same will have capacity to carry sixty feet of water, i. e., so that the volume of water at any point, measured by multiplying width and depth shall equal sixty feet; that unless the ditch is so enlarged the water shall not be conducted beyond its present terminus; that after enlargement the second parties may carry through said enlarged ditch such amount of water as they may desire, to the full capacity of said ditch, after furnishing to persons constituting first parties, not less than two thousand five hundred ninety-two inches of water measured under five-inch pressure, etc. The residue or remainder of the water carried through said ditch is to belong to the second parties, and may be by them taken onward, and used as they may decide by an extension of the ditch from its present terminus to any desired point, and applied to any useful purpose. It further provides that after enlargement, the expense of keeping it in good order and repair from its head to present terminus (stating place thereof) should be borne in ratio of nine-thirtieths by first parties, assigns, etc., and the remaining twenty-one thirtieths by second parties, assigns, etc.; that the expense of maintaining the extension ditch should be borne wholly by second parties, for all time, the first parties having no interest therein.

The plaintiff claims that under the terms of the contract, considered as a whole, and construed in the light of the surrounding circumstances, at the time of its execution, and the interpretation thereafter placed upon it by all parties thereto, and successors, for twenty-nine years, that it, the plaintiff, was to have the use of all waters to be carried through the canal and extension, or in any wise appertaining thereto, except the amount required by the defendants, and their predecessors, for the irrigation of certain lands, and domestic purposes, and when needed only for these purposes, and then not at any time to exceed the aggregate of eighteen cubic feet of water per second of time, and that it, the plaintiff, is entitled to this eighteen second feet or any

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portion thereof when not needed for the purposes named, and should have its title to all quieted accordingly.

It is unnecessary to attempt an analysis of the contract. It is sufficient to say that when considered in its entirety without evidence, *aliunde,* it is doubtful and uncertain as to what the words "two hundred eighty-eight inches" or "two thousand five hundred ninety-two inches" were intended to mean, for which reason, in order to ascertain what was intended, it is proper to take into consideration the extrinsic circumstances surrounding the parties attending its execution, as well as the construction the parties to it placed upon it; for these reasons the demurrer should have been overruled.

In *Stewart v. Austin,* 50 Colo. 249, 115 Pac. 516, this court recognized the ambiguity of the word "inches" in reference to any amount of water in the following language. "The expression, in inches, of the claims of the several owners is indefinite as to what was really intended. In fact, the use of the term 'inches' creates confusion. The whole volume of the appropriation, or the full capacity of the ditch, was computed, at the time, to be 864 inches, whatever that may mean."

In Mills' Irrigation Manual at page 133, referring to the measurement of water, it is said: "The term inch is often confounded with other kinds of inches. It is sometimes used to refer to a square inch of water flowing over a weir, or in an open channel, without reference to the velocity, and hence without reference to quantity. Thus, a channel having a cross-section of one square foot would be spoken of as 144 inches without regard to whether the velocity is one foot per second, two feet per second, or any other number of second feet." An example of decrees founded upon the uncertainty of cross section area is furnished in *Broadmoor Co. v. Brookside Co.,* 24 Colo. 541, 52 Pac. 792. In Long on Irrigation, section 97, it is said, "Where the decree states the quantity of water awarded in inches, it must show further what kind of an inch is intended, for the term 'inch' is itself indefinite." This fact is recog-

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nized in *Bowman v. Bowman,* 35 Ore. 279, 57 Pac. 546. In *Gardner v. Wright* 49 Ore. 609, 91 Pac. 286, the court found difficulty in understanding the meaning of the word "inches" in the absence of testimony showing what was intended. In *Re Huntley,* 85 Fed., 889, 29 C. C. 9 A. 468, the court was of the opinion that the words "150 inches, statutory measurement" was too indefinite. In *Longmire v. Smith,* 26 Wash. 439, 67 Pac. 246, it is recognized that the word "inches" as used by farmers is indefinite, where the pressure and method of measurement are not given. In *Dougherty v. Haggin,* 61 Calif., 305, the judgment was reversed because inches were found by taking the cross section area. The inaccuracy of the word "inch" was also recognized in *Janesville Cotton Mills v. Ford,* 82 Wis. 416, 52 N. W. 764, 7 L. R. A. 564 as well as in *Jackson Milling Co. v. Chandos,* 82 Wis., 437, 52 N. W. 759. In *Animas Co v. Smallwood,* 22 Colo. App., 476, 125 Pac. 594, in placing a construction upon a contract concerning the delivery of water, it was held that the words 'provided the total capacity of all of said boxes (10) shall not exceed four cubic feet of water per second' did not mean that the plaintiff in order to secure the agreed amount was required to use all the boxes at the same time, running at their full capacity, but was entitled to use such of the boxes as he might wish, the total capacity of which should not exceed four cubic feet, and that as bearing upon this language, the contract should be construed as a whole, and in the light of well known physical facts concerning the matters effected by the agreement.

A consideration of previous cases will disclose that in this jurisdiction we have many expressions or terms used in connection with the word "inches", when applied to the measurement of water for irrigation purposes, such as farmers inches, miners inches, customary inches, statutory inches, square inches, cubic inches, etc. An examination of the reports of our state engineers will disclose that many methods have been given designations and followed in the attempted measurement of

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the running waters in our streams, canals and laterals; that the most of them at least have fallen short of absolute accuracy is readily apparent when we consider the conditions under which these measurements are attempted and the many facts which must be taken into consideration in arriving at a conclusion.

Counsel for appellees rely on *Grand Valley Irrigation Co. v. Lesher,* 28 Colo. 273, 65 Pac. 44, where the words "each water right contains one hundred fifty inches" were taken to mean statutory inches, for the reason as stated. "The reasonable interpretation of this certificate, then, is that the company acknowledges that O. is entitled to 150 inches of water, to be delivered to him in some manner, and at some place. How and where, the certificate does not say. The use of the word 'inches' in the certificate must be taken to mean statutory 'inches,' as applied to water." It will be observed that there was nothing in the certificate to contradict this conclusion. It was also evidence of the sale of a water right, and contained nothing which showed that anything to the contrary was intended. Such is not the case here. Other portions of the contract might properly be construed to mean that a different amount was intended, for instance, it conveys the right of way to conduct, etc., to such an extent and in such amount as may become practicable within the capacity of the ditch when enlarged, etc. This calls for the total carriage of a practical amount in a ditch of a certain size; it provides that the size of the ditch when enlarged shall be not less than twenty feet in width, and three feet in depth, or fifteen feet in width and four feet deep. It then reads "So that said ditch will have a capacity of carrying sixty feet of water. That is, so that the volume of water, at any part, measured by multiplying the width by the depth shall equal sixty feet." It will thus be observed that in the contract there is used the term "practical" in connection with "capacity", also a capacity of sixty feet of of water to be measured by multiplying the width by the

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depth. If this last was standing alone, it would be quite evident that the parties intended by the words "sixty feet of water" to mean square feet, that is the size of the cross section of the ditch through which it flowed as they thus define it. If they intended to give to the use of the word "inches" the same definition, it follows that the same rule of measurement would apply, and while, as stated, it is not our intention to place any construction upon the contract, it is sufficient to say that when considered in connection with the alleged surrounding facts, there is ground to support the appellant's contention. This is further emphasized by the fact that the cost of maintenance is to be borne, twenty-one thirtieths by the plaintiff's predecessors and nine-thirtieths by defendants and their predecessors. This is in exact proportion to the amount of water to which each is entitled when the measurement contended by appellant is accepted; that is, if its theory is correct, each person would pay his proportion of the expenses, for future maintenance, in proportion to the amount of water to be received by him; that is when the canal was constructed to the capacity called for in the contract.

Counsel for appellees concede that the decrees for this ditch are not in harmony with their construction of the contract which gives to them 65.5 or 67.5 second feet, but they say this is of no significance because they have always expressed their intention to accept the result of these adjudications, and to not claim more than 47.88 second feet awarded to the priorities owned by them and their grantors prior to 1880, and that the only subject upon which there could be the slightest doubt is as to whether the quantity of water reserved by them should be 65.5 second feet or 47.88 second feet determined by court to belong to certain priorities for this ditch, and whether the contract should be regarded as modified by operation of law through the decree subsequently entered adjudicating those priorities. This argument discloses an element of uncertainty pertaining to what are

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the relative rights of the parties from the view point of the defendants.

We agree with counsel that a law in force when a contract is made is as much a part of the contract as though incorporated in it; but we cannot agree that section 7026 R. S., 1908, is controlling unless it was so intended by the parties to the contract. The question is, what amount of water, what kind of measurement was intended, if the amount and measurement provided by section 7026 was intended, it should prevail; if the parties contracted otherwise, then their intention should control. It should be borne in mind that this is not a sale or rental of water by the plaintiff to the defendants; to the contrary, the defendants and their predecessors were the owners of the ditch and certain amounts of water, and the question is what was intended to be reserved under the contract, under which they turned the use of most of the ditch, and the waters to be secured therefrom, over to the predecessors of plaintiff; the contract does not state statutory inches. 'Tis true, it provides a measurement under a five-inch pressure the same as prescribed by statute, but the other matters prescribed by the statute are not referred to or adopted unless by implication. This is another reason why we think the other alleged matters should be taken into consideration in order to ascertain what was intended.

It is unnecessary to determine whether the plaintiff's possession and control of the ditch is in the nature of a trust estate as trustee or otherwise, or the effect which might follow such conditions. We do not understand that the plaintiff has attempted to predicate its cause of action alone upon its possession and use of the canal. Its counsel disclaim that such was intended. As we understand the complaint, the rights of the plaintiff are predicated upon the contract, and the allegations pertaining to use and enjoyment are plead for the purpose of disclosing what was intended by the language used.

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It is urged because the complaint alleges that the defendants threaten to institute or cause to be instituted, etc., suits to change the point of diversion of the water in dispute, that this action cannot be maintained, for the reason that all questions involved can be settled in such contemplated suits; that the statutory method providing for change in the point of diversion is an exclusive remedy for which reason that question cannot be determined elsewhere. One phase of this question was first considered by this court in *Irrigation Co. v. Water S. & S. Co.*, 29 Colo. 469, 68 Pac. 781. It was there held that the act of 1899 provides an exclusive remedy for making such changes, for which reason after its adoption the courts were without authority to make such change in any other action or by any other method of procedure than provided in the act. This ruling has been followed ever since, but it is not applicable. The plaintiff is not seeking to change the point of diversion of any water. The primary object of this action is to obtain a decree quieting title to certain water rights which carry with them certain rights, privileges or easements in and to a certain canal. The plaintiff's constitutional, as well as statutory, right, to have this done cannot be defeated because the defendants, among other things, threaten to institute suits to change the point of diversion of water, the greater part of which it is alleged they do not own. This threat is but one of many by which it is alleged the plaintiff is damaged and its property made of doubtful value. These threatened suits may never be brought, and the question is not, what will be the relative rights of the parties in an action involving the transfer of water from this ditch, but what are their rights now. The alleged cause of action arises out of a contract. Under the circumstances, as alleged, the plaintiff is entitled to have its interest thereunder defined, and its title quieted. When this is done the question of whether the defendants can have transferred that to which they are entitled under the terms of the

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contract, and whether such transfer will work injury to others which may call for conditions under which, if at all, it can be made, must be left for determination as the statute provides, and which, as this court has repeatedly held, is the exclusive method provided for the determination of those questions. But it cannot be assumed and no cases have been cited which hold that it was intended to prevent any one from bringing an action such as this for the construction of a contract and to quiet the title to such property as the plaintiff has acquired thereunder.

There was a motion to strike parts of the complaint. The general demurrer was to the balance. The motion to strike was sustained. In considering the complaint tested by the demurrer, we have taken into consideration all material facts well pleaded, whether included in the portion stricken or that remaining. From the conclusion reached, it follows that the greater part of that stricken was material as an aid in determining what was intended by the parties to the contract, all such should be reinstated. It is unnecessary to go into it in detail. The reasons given why the demurrer should be overruled are sufficient for this purpose. The judgment is reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

Reversed.

Decision *en banc.*

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[No. 7097.]

LARIMER COUNTY CANAL NO. 2 IRRIGATING COMPANY v. NEW CACHE LA POUDRE IRRIGATING COMPANY ET AL.

PLEADINGS—*Complaint*, praying an injunction to restrain the diversion of water to the prejudice of plaintiff, held sufficient.

Error to Larimer District Court.—Hon. JAMES E. GARRIGUES, Judge.

Messrs. RHODES, TEMPLE and FOSTER, for plaintiff in error.

Mr. H. N. HAYNES, for defendant in error.

On re-hearing.

Mr. JUSTICE SCOTT delivered the opinion of the court:

In this case the trial court sustained a demurrer to the complaint. The plaintiff elected to stand on its complaint and thereupon the court dismissed the action and for which error is alleged here.

The only ground of demurrer necessary to consider is that the complaint does not state facts sufficient to constitute a cause of action against the defendant

The complaint is voluminous, but enough can be gathered from its averments, from which it appears that it states a cause of action in the following particulars: (1) The enlarged use of the priorities awarded the defendant company to the detriment of the plaintiff; (2) Exchanges of water between the owners of reservoirs taking their supply of water from the river with the defendant company, whereby the plaintiff is deprived of

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the full use of its priorities; (3) The failure on the part of the defendant water commissioner to take into account the accretions to the river between the headgates of the respective companies, whereby the commissioner requires more water to pass the headgate of the plaintiff company than is necessary to supply the priorities of the defendant company, the result of which is that the plaintiff is deprived of the full use of its priorities.

We think the averments of the complaint from which these conclusions can be deduced state a cause of action, and that the court erred in sustaining the general demurrer. It is true that the complaint in some respects is rather ambiguous, but it is not sufficiently defective in this respect to justify sustaining the demurrer on that ground. However, we are of the opinion, that the complaint might well be made more definite and certain, and in the event the defendant company is so advised, it should be permitted to file a motion requiring the complaint to be made more specific in its averments of the facts upon which the cause of action is based.

The judgment is reversed with instruction to proceed with the cause in accordance with the views herein expressed.

Former opinion withdrawn and the foregoing opinion filed.

MUSSER, C. J. and GABBERT, J. concur.

Decided July 7, A. D. 1913. Rehearing denied July 8, A. D. 1914.

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[No. 7245.]

COLORADO LEASING, MINING & MILLING COMPANY v. PALATINE INSURANCE COMPANY, LIMITED.

INSURANCE—*Application for Policy*, made after the issuance of the policy, and without any agreement that it shall be made, is no part of the contract. The case ruled by the judgment in *Connecticut Company v. Colorado &c. Co.*, 50 Colo. 524. (236)

Error to Fremont District Court.—Hon. M. S. BAILEY, Judge.

Mr. JAMES T. LOCKE, for plaintiff in error.

Mr. SYLVESTER G. WILLIAMS and Mr. CLYDE C. DAWSON, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Every contention raised in this case has been adjudicated in the case of *Connecticut Ins. Co. v. Colo. Leasing, Mining and Milling Co.*, 50 Colo. 424.

This case involves one of the insurance policies issued at the same time, upon the same property, and to the same owner as in the foregoing case.

The defendant in error here issued its policy for $20,000, being one-third of the entire insurance taken upon the mill and property of plaintiff in error, on the 27th day of May, 1904. An exhaustive and detailed statement of the case will be found in *Connecticut Co. v. Colo. Co., supra,* and it can serve no good purpose to repeat it here. The only question urged in this case is the admission in evidence of an application for insurance signed and delivered to the defendant company, after the delivery of the company's policy to the plaintiff in error, and the consideration given by the court to one of the questions and answers contained in such application.

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These points have been determined in the *Connecticut Ins. case, supra,* but it may be well to refer to them further.

The record makes it clear that the application relied on by the insurance company in this case was not written, signed, suggested, or considered prior to the delivery of the policy in question, but was first requested by the general agent of the company, in a letter written from his office in San Francisco, two days after the policy was issued and delivered by the agent of the company at Florence, Colorado, where this cause of action arose.

This very application was offered in the *Connecticut Co.* case and was there held to be inadmissible in any case, under the state of facts presented, and particularly so in that case, where it did not purport to be an application for the policy nor to the company involved in the action. The court there said of this application:

> "The defendant says the court erred in refusing to admit in evidence an application for insurance made by the plaintiff to a company other than the defendant, and delivered to McCandless several days after the policy in this case was issued. That the application was inadmissible, even if made to the defendant, when it does not appear that the making of the application was a condition precedent to the policy taking effect or that it was made under an agreement on the part of plaintiff to make one after the issuance of the policy, is settled by this court in *Loyal Mutual Co. v. Brown Co.,* 47 Colo. 467, [107 Pac. 1098], and when made to an entirely different company than the defendant, there is much more reason for not admitting it."

This has been the consistent holding of this court. In *Loyal Mutual Co. v. Brown, supra,* the court said:

> "It should be borne in mind that it does not appear the execution of the application was a condition precedent to the policy taking effect, or that it was issued under an agreement on the part of Beach to

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execute one afterwards. In such circumstances the rule of law is, that where a policy of insurance has been issued without a written application, and without an agreement to execute one afterwards, an application subsequently delivered is not a part of the contract of insurance.—*Mich Ins. Co. v. Wich,* 8 Colo. App. 409, [46 Pac. 687]; *LeRoy v. Park Fire Ins. Co.,* 39 N. Y. 56."

The court in the case at bar instructed a verdict for the defendant company, and such instructed verdict was based solely upon the erroneous theory that such application was a part of the contract of insurance, and therefore admissible, and that the answer to a specific question in such application was material.

Holding then, that the application was no part of the contract of insurance, in this case, it is immaterial as to what questions and answers it contained. They were not under such circumstances either representations or warranties and constituted no consideration or basis for the issuance of the policy. The questions raised by the appellee having been fully disposed of and determined in this case, and in the *Connecticut Co. v. Colo. Co. supra,* and the amount of judgment to be rendered exactly ascertainable from the record, the judgment is reversed and the cause remanded with directions to enter judgment in favor of plaintiffs below, and against the defendant below, in the sum of one-third of the amount found by the adjusters committee to be the actual loss by reason of the burning of the insured property, together with interest from the commencement of this suit, and with costs to be taxed.

Judgment reversed and remanded.

MUSSER, C. J. and GARRIGUES, J. concurring.

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[No. 7239.]

GREEN v. HULSE.

1. LUNATICS—*Conveyances by.* The great weight of authority is that the deeds of persons in fact insane, but not so adjudged are oidable and not valid. (243)

When such a conveyance comes in question the inquiry should not be limited to the mental condition of the donor, but the circumstances attending the transaction and the conditions under which the deed was executed should be investigated. If upon a valid consideration, without fraud upon or undue advantage taken of the grantor's condition, if the transaction was fair and for the interest of the grantor, it should be sustained.

To exclude evidence of these circumstances and conditions, *is error.* (243, 244)

2. ——*Who May Assail the Conveyance.* The deed of a lunatic is not open to assault by anyone and everyone. The heir at law may contest its validity if he has not in some way precluded himself from taking such action. (244)

3. ESTOPPEL—*By Conduct.* When one, with actual knowledge of the facts, induces another, by words or conduct, to believe that he approves or acquiesces in a transaction, and the other relying upon the assurance, alters his position, the former is estopped from repudiating the transaction, to the other's prejudice.

The son, knowing that his mother, aged, infirm, and mentally unbalanced, contemplates the conveyance of real estate to another, upon the engagement of the other to support her during her natural life, approves the arrangement, and expressly consents thereto. He will not, after the death of the mother, be heard to assail such conveyance upon the ground of her mental incompetency.

Nor will his wife, who, having likewise assented to the transaction with full knowledge, has accepted the voluntary conveyance of the husband. (244, 245)

Error to Denver District Court.—Hon. GREELEY W. WHITFORD, Judge.

Messrs. TONEY, BARKER & BOYD, for plaintiff in error.

Mr. HARRY E. KELLY and Mr. CHARLES H. HAINES, for defendant in error.

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Mr. JUSTICE GARRIGUES delivered the opinion of the court:

1. The subject of this action is the title to lot 38 and the south half of lot 39, block 16, Berkeley, City and County of Denver. Plaintiff's object is to recover possession and damages, and cancel a deed and trust deed as clouds upon the title.

The complaint alleges that Clara M. Hulse is the owner in fee simple of the property; that her husband's mother, Persis Hulse, died intestate October 14, 1909, owning the property; that for a year or more prior thereto, she had been of unsound mind, and incapable of conveying property; that well knowing her condition, defendant, Maud Green, June 25, 1909, by threats, duress, and undue influence, coerced Persis Hulse into signing, acknowledging and delivering a deed purporting to convey the property to Green, as her free and voluntary act, and the same day ousted Persis, and took possession of the premises herself, which ever since she has detained; that August 17, 1909, Green borrowed $700.00 from defendant Emma Peterson, and secured the loan by a trust deed on the property; that Peterson, when she made the loan, knew Persis was mentally unsound, and that Green had no title; that Burns Hulse, the son and sole heir of Persis, inherited all the property from his mother, and October 16, 1909, deeded it to his wife, the plaintiff, and that Green's deed, and the trust deed, are clouds upon her title. Prayer for possession, damages, and that the deed and trust deed be declared void, and canceled.

The answer admits all the conveyances, and alleges the deed to Green was made by Persis of her own free will, in consideration of the following agreement, which Green has kept and performed; that she owns the property in fee simple; and denies the other allegations of the complaint:

> "In consideration of receiving absolute title to lot 38 and the south half of 39, in block 16, Berkeley,

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City and County of Denver, Colorado, I hereby agree to take care of Mrs. Persis P. Hulse during her natural life, furnishing her with comfortable board, lodging and clothing, and such medical attendance as may be necessary; also to pay funeral expenses in case of death. (Signed) Maud O. Green."

It then pleaded an equitable defense of estoppel by conduct *in pais,* to the effect that Persis Hulse, living alone, 75 years old, infirm, disagreeable, and hard to get along with, was without means, and in need of help, with no one to care for her; that her son Burns and his wife (the plaintiff) refused to care for her or allow her to live with them, or to come to their home; that her sister, 85 years old, had, in consideration of maintenance, deeded her property to Green, who was caring for her, and Burns and his wife proposed to Green that she make the same arrangements with Persis, and care for them both, and that it was through the desire, solicitation, advice, consent, knowledge, acquiescence, and approval of plaintiff and her husband that the deed and contract were executed. This portion of the answer was stricken on plaintiff's motion. At the trial, a jury was waived, and the court confined the issues, and narowed the case to the trial of the single question of the sanity of Persis Hulse at the time of making the deed, and in effect turned the case into an inquisition in lunacy, and found that when she made the deed, she was a lunatic, incapable of making a conveyance, and that the deed was on that account, at the time it was made, absolutely void and of no more legal effect than if it had never been executed. Plaintiff was awarded possession and damages, and the deed to Green and Peterson's trust deed, were canceled.

2. Persis Hulse, about 75 years old, owned, and lived alone in the property in controversy. She was disagreeable, without means, infirm, mentally deranged, or unbalanced, and needing attention, with no one to care for her. Her son Burns and his wife lived in the

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city, but did not want her in their house, and she objected to living with them. She had a sister 85 years old, who, sometime previously had deeded her property to Green in consideration of maintenance, and Green was taking care of her. Green was their niece, and Persis wanted to make a similar arrangement, so she could be with her sister, and have Green care for them both. The matter was frequently discussed between Persis, her elder sister, Mrs. Green, Burns Hulse, and plaintiff, and it was their general opinion that Persis should deed the property to Green. Burns participated in some of these conversations, and suggested, approved and advised the transaction. Accordingly, June 25, 1909, Persis, in company with others, went to a notary public at the Albany hotel, where the deed was prepared, signed, acknowledged and delivered to Green, who in turn executed and delivered the contract. Burns knew they were going to the hotel to make these papers, and had promised to be present and assist. He went there ostensibly for that purpose, but for some reason, left before they arrived, did not return, and was not present when the papers were executed. Plaintiff and her husband considered the making of the deed and contract before their execution, and raised no objection, and expressed their willingness that the transaction should be consummated. It was fully and carefully discussed and considered by them, and the papers were finally executed with the consideration and formality usually attending the execution of such documents. Green then took Persis to her home where she cared for her until her death, except during a short period when she was at the hospital for treatment. Green borowed $700.00 from Mrs. Peterson, and secured it by a trust deed on the property. Peterson loaned the money in good faith, without any knowledge of the alleged infirmity in Green's title, and the deed contained no clause showing the consideration was maintenance, and that a failure to perform the acts promised, should invalidate it, and entitle the grantor to a reconveyance. Shortly after Persis' death, plaintiff obtained

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a quit-claim deed from her husband, and brought this action.

Plaintiff offered no evidence tending to show fraud, undue influence, duress, coercion, undue advantage, persuasion, over-reaching, circumvention or any wrong or improper act or bad faith, or evil purpose of any kind, going to the fairness of the transaction. When defendant attempted to show the transaction was fair and right, and for the best interest of Persis, the court excluded the evidence. It would hear evidence on no disputed allegation other than the sanity of Persis Hulse, and permitted no other matter to be gone into. A preponderance of the evidence showed that Persis was old, infirm, erratic, queer, weak-minded, changeable, forgetful, disagreeable, repulsive, hard to manage, unbalanced, occasionally had epileptic attacks, was probably addicted to some drug habit, and that her mind was affected from old age—senile dementia. She was a person no one would like to have in their home. While she did not have a sound mind, capable of transacting business, the evidence does not show that she was wholly insane, or incapable of understanding the purpose of the transaction. She had sufficient mental capacity to understand and appreciate the transaction and to consent to the act of execution. By this we do not mean that she was mentally competent to conduct a business transaction, but that she was able physically and mentally to sign and acknowledge the deed.

3. The trial court went off entirely on the single question of insanity, and would consider nothing else. It misapprehended the controlling principles of law which should have governed the case. He took the position that the only material question in the case was the trial of the fact of Persis Hulse's mental condition when she executed the deed; that if she was unsound mentally, then regardless of all other considerations, the deed was necessarily void, for all purposes, when executed. Proceeding upon this theory, it excluded from the testimony

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much competent evidence which might have had an important bearing on the controversy. The distinction between a void and voidable instrument of insane persons was ignored. Persis Hulse had not been adjudged insane by any competent tribunal at the time she made the deed. The great weight of authority is, that deeds of persons in fact insane, but not so adjudged, are generally held to be voidable and not absolutely void.—*Wolcott v. Insurance Co.,* 137 Mich. 309, 100 N. W. 569; *Jamison v. Culligan,* 151 Mo. 410, 52 S. W. 224; *Insurance Co. v. Sellers,* 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; *Blinn v. Schwarz,* 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806; *Lumbering Co. v. Theriault,* 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856; 22 Cyc. 1171. Mrs. Green was not trying to drive a business transaction with Mrs. Hulse. She was with her relatives who apparently had her interest at heart, and wanted the property to be used for her support. Under such circumstances, while she might pass in the class of lunatics, and be held mentally incompetent, this would not of itself necessarily make the deed in this case void. At most it would be voidable only, subject by a proper proceeding by the person having the right, to be avoided. If it be said that was the purpose, and just what the court did in the instant suit, the answer is, the court did not proceed upon the theory that the deed was voidable only, and hear evidence as to the facts and circumstances connected with the transaction, and conditions under which it was made, for the purpose of determining its validity, or whether plaintiff was precluded from bringing suit. It heard evidence as to her sanity only, and decreed that her mental condition merely, regardless of all other considerations, necessarily rendered the deed void when executed. This was not proper. If the transaction was fair and reasonable, and based upon a valid consideration, without fraud, and there was no circumvention, over-reaching or undue advantage taken of the grantor's mental condition, and the contract was made in good faith and was fair, and

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was for her benefit and to her best interest, then the court ought to have sustained the deed and held it absolute under the circumstances of this case. Instead of this it excluded all evidence tending to show that though the deed was voidable, it should nevertheless, under the circumstances connected with its execution, and the purpose for which it was made, be declared valid and absolute. Whether it should have been declared void after her death, at the suit of the heir, was a question that depended upon the evidence, which the court should have considered.

4. Upon the question of estoppel, even if Persis Hulse was so insane as to render her mentally incompetent to make a deed, it does not follow that it could be defeated, cancelled, or set aside by anybody, without the right, by showing that she was insane. There must exist some occasion or reason for pronouncing a voidable deed void, and the person must have the right to bring the action. Just anyone cannot ask to have the deed of an insane person overturned merely because he was insane. Burns Hulse, the heir, upon the death of his ancestor, the grantor, could do so, unless he was precluded by the facts, conditions and circumstances surrounding the making of the deed. He could by his own conduct be estopped from asking to have the voidable deed of his insane ancestor pronounced void. The question is, whether under the conditions and circumstances surrounding the making of this deed, he is precluded by conduct, from now having it canceled. The doctrine of equitable estoppel applies to him, and whatever will preclude him, will estop his wife, the plaintiff, because her deed was purely a voluntary conveyance; in addition to this she took the title knowing all the circumstances, so in what we say, we draw no distinction between them. She knew her mother-in-law was contemplating this contract with Mrs. Green. She knew it was her husband himself who first broached the subject of such an arrangement. He knew of the time and place, and promised to be present at the hotel when the papers were executed. Plaintiff herself knew all about the transaction

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and that the deed was to be made to Mrs. Green. She says that she and her husband knew of the contract, and were perfectly willing that the deed should be made. There is no doubt but Burns Hulse was instrumental in causing the deed and contract to be executed. We then have this condition: Plaintiff was perfectly willing that Mrs. Green should assume the responsibility, trouble and expense of the care of her husband's old and demented mother; she was willing that a contract should be made to that effect and that Mrs. Green should receive a deed to the property; being fully informed of the transaction, encouraging it, and making no objection thereto, she now, after the death of the old lady, seeks to step in and not only take the property from Mrs. Green, but deprive an innocent lender of her security, upon the ground that Mrs. Hulse was mentally incompetent when she made the deed. She knew all of these facts when she consented and acquiesced in the transaction and then raised no objection to the mental capacity of Mrs. Hulse to make the deed. This does not appeal to us as equitable or just. Where a person with actual knowledge of the facts, induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and the other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice.—*McPherson v. Berry,* 92 Ia. 64, 92 N. W. 64; *Paine v. Bank,* 194 Pa. St. 403, 45 Atl. 312; *Thor v. Olsen,* 125 Ill. 365, 17 N. E. 753, 16 Cyc. 791. "In cases involving the title to real estate, the doctrine of estoppel by conduct rests upon the broad principle of equity, that one who encourages by representations, or even stands by and sanctions the acquisition of land by another, will be estopped to defeat the purchase by afterwards asserting title in himself."—*Patterson v. Hitchcock,* 3 Colo. 533; *Yates v. Hurd,* 8 Colo. 345.

Under the circumstances of this case, we do not feel we would be upholding the law and rendering substan-

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tial justice, to allow Burns Hulse to come in now, after the death of his mother and defeat the title of Mrs. Green to this property, and his wife is in no better position.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

CHIEF JUSTICE MUSSER and MR. JUSTICE SCOTT concur.

[No. 7333.]

OLES v. WILSON, EXECUTOR ET AL.

1. CONTRACTS—*To make a Particular Will or Bequest*, if upon consideration and without surprise, imposition or fraud, is a valid contract, and may be specifically enforced in equity. That the beneficiary in the contract is, by his or her parent submitted to the custody and nurture of the promissor, is a sufficient consideration. No valuation can be placed upon the society, companionship and filial obedience of a child towards its foster parent, or the sacrifice which the parent makes, in the surrender of his child; therefore the courts will not inquire as to the adequacy of the consideration where the promissor has received and enjoyed that to which, under the contract, he became entitled. (261)

Plaintiff's father entered into a written agreement with Macky, when plaintiff was only seven years of age, by which he committed plaintiff to the care and nurture of Macky and his wife. The agreement provided that the child should become a member of the family of Macky, subject to his discipline and that of his wife, until her majority, that she should receive a liberal education, and that Macky would by his will devise to the child a portion of his estate, equal in the minimum to one third of the value of the whole thereof. At the time of this agreement the child's mother was dead, and the father and Macky were intimate friends. The child remained in the family of Macky, performing the duties of a child, until after her majority.

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The court declined to hold the contract voidable, for inadequacy of consideration, want of certainty, mutuality, or equity. (264)

2. LIMITATIONS—*Statute of Non-Claim.* A bill for specific performance of a contract to provide by will for a person named, is not within the provisions of Rev. Stat. § 7206. The phrase "all demands" in the first clause of the section includes only the demands of widows, orphans and creditors. Demands of this character must be satisfied in advance of distribution. The right of the beneficiary in such a contract as supposed is an equity in what remains after all such demands as mentioned in the statute are adjusted and paid, and can be asserted only in a court of original and general equitable jurisdiction. (255)

3. DISTRICT COURT—*Jurisdiction.* The district court has jurisdiction of a bill to enforce the specific performance of an agreement to make provision by will for a person named, instituted by the beneficiary, against the executor, and legatees who have received allowances out of the estate to the prejudice of the beneficiary in such contract. Sections 7141-7146, 7254, of the Revised Statutes have not the effect to confer exclusive jurisdiction of such an action upon the County Court. (257, 258)

4. SPECIFIC PERFORMANCE—*Contract—Certainty.* Only reasonable certainty is required, considering the subject matter and purpose of the contract, the situation and relation of the parties, and the attending circumstances. (265)

Where the party chargeable under contract received the benefits thereof, the court does not regard with favor objections grounded upon the incompleteness or uncertainty of the contract.

Where the chief purpose of a contract is manifest, and can be enforced, relief will not be refused merely because there is an impossibility to carry out some collateral or subsidiary agreement, according to the precise terms. (266, 267)

5. ——*Parties.* The bill being brought to enforce a contract to make provision by will for the plaintiff the court said that it would have been proper to have joined as defendant, all the legatees named in the will; but the residuary legatees to whom the great bulk of the estate was devised, being joined, it was said that to bring in the others, would in nowise benefit the executor. His demurrer upon this ground was therefore overruled. (272)

6. ——*Judgment.* Relief is afforded by declaring the legatees named in the will, trustees for the plaintiff, to the extent of her right. (269)

7. PARTIES—*Bringing in New Parties.* The provision of the code (§ 16) requiring new parties to be brought in has reference only to indispensable parties. (273)

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8. APPEAL AND ERROR—*Questions Not Presented Below*, will not be considered. (272)

Error to Boulder District Court.—Hon. CARLTON M. BLISS, Judge.

Mr. O. A. JOHNSON, Mr. T. A. MCHARG, Mr. C. S. THOMAS, Mr. W. H. BRYANT, Mr. GEORGE L. NYE, Mr. WM. P. MALBURN, Mr. JAMES H. BREWSTER, for plaintiff in error.

Hon. BENJAMIN GRIFFITH, Attorney General, Mr. CHAS. O'CONNOR, Assistant Attorney General, Mr. HENRY O. ANDREW, Mr. JUNIUS HENDERSON, Mr. HAROLD P. MARTIN, Mr. JOHN A. GORDON, for defendants in error.

May Oles brought suit against Thomas V. Wilson, executor of the estate of Andrew J. Macky, deceased, for the specific performance of a written contract, entered into on August 27, 1880, by and between John M. Bradford and Andrew J. Macky. Thereafter the Board of County Commissioners of Boulder County, and The Regents of the University of the State of Colorado intervened. An amended complaint was thereupon filed, to which the intervenors separately demurred and, the demurrers being sustained, the plaintiff brings the cause here for review.

From the amended complaint it appears that plaintiff's maiden name was Moina May Bradford; that John M. Bradford was her father, and died in New Mexico on July 9, 1892; that Andrew J. Macky died, testate, on June 11, 1907, possessed of an estate amounting to $450,000, and his will was admitted to probate in the County Court of Boulder County on July 29, 1907, and letters testamentary issued to Thomas V. Wilson, the executor named in such will; that at and prior to the execution of the contract in question Bradford and Macky

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had been, and were, intimate friends and business associates; that the former had the utmost confidence in the integrity of the latter, and relied implicitly upon his promises, covenants and agreements; that Macky and his wife resided in Boulder, Colorado, and were childless; that the mother of plaintiff was dead, and Macky had solicited and importuned Bradford for the care and custody of the plaintiff, who was then seven years of age, in order that he might have the enjoyment of her society and companionship in his home, and promised Bradford that he would maintain, educate and support the child as his own, and at his death leave to her one-third of his entire estate, if Bradford would surrender to him the care and custody of the child from thence on until she attained the age of eighteen years, which Bradford thereupon consented to do; that in consideration of the premises Bradford and Macky executed the following contract, to-wit:

> "This contract is made and entered into this twenty-seventh day of August, A. D. 1880, in the City of Leadville, County of Lake, State of Colorado, by and between Jno. M. Bradford, whose child is herein named as the cause of this action, and Andrew J. Macky who desires and importunes the possession of said child, and in the presence and to the knowledge of those parties whose names are hereunto subscribed.
>
> "Accordingly it is hereby agreed that Moina May Bradford, who was born the twentieth day of May, A. D. 1873, at Lincoln, Nebraska, and whose mother, Alice D. Bradford departed this life in Georgetown, County of Clear Creek, State of Colorado, in the year A. D. 1874, and who is the daughter and only living child of Jno. M. Bradford, shall, on this day, and for reasons agreeable to the said John M. Bradford and Andrew J. Macky, pass from the care and guardianship of the said John M. Bradford in the City of Leadville, State of Colorado, to the home and keeping of Andrew J. Macky in Boulder, County of Boulder, State of Colorado.

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"It is also agreed that Moina May Bradford shall, by her father's consent, become a member of the family of Andrew J. Macky, subject to the discipline and control of the said Andrew J. Macky and his estimable wife, Adelaide B. Macky (which discipline and control it has been promised by both parties shall be, at all times, of a kind and parental character) from the day that she shall reach Boulder until she shall have attained her majority, and that she shall continue to remain in the said home and in said family for such indefinite period thereafter as shall be agreeable to herself, and to the members of said family.

"That only for good and sufficient reasons, consisting of alleged and proven neglect or mistreatment, or for acknowledged, or proven mental or financial inability, or for any long and continued dissatisfaction of any or more parties herein named, shall the said Jno. M. Bradford make any action to remove his daughter from the custody of Andrew J. Macky, and to further annul and discontinue the terms of this contract.

"It is further agreed that Andrew J. Macky shall maintain and provide for Moina May Bradford during the life of the said Andrew J. Macky, and during the life of the said Moina May Bradford in a manner and amount appropriate and reasonable in proportion to his income and available means.

"It is also agreed that the said Andrew J. Macky shall cause the said Moina May Bradford to receive a liberal and thorough school and college education, in such schools and other institutions of learning as shall in his judgment seem the most desirable and the best calculated to insure fruitful and satisfactory results, and that he shall also foster and promote such talent or ambition as may awaken or become manifest during her years of growth and development, from childhood to womanhood.

"And it is further agreed that the said Andrew J. Macky shall make actual and careful provision for the future welfare and maintenance of

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the said Moina May Bradford, by preparing and having in his possession at all times a legally executed and valid will, in which he shall name all money, property and securities existing under his own right and title, and comprising his individual assets, together with a specific enumeration for the disbursement and distribution of the same, which shall state in plain and direct language the wishes of the said Andrew J. Macky in the event of his death, and in which aforesaid legally executed and valid will he shall bequeath to the said Moina May Bradford a portion amounting in the minimum to or sum equal to not less than one-third (1-3) of the valuation of his entire estate.

"In consideration of the welfare and happiness of his child, and in consequence of his absolute confidence in the word and integrity of Andrew J. Macky, and as an expression of the highest esteem and most sincere regard, this contract is framed and signed by

JNO. M. BRADFORD.

"The terms of this contract are known and understood and accepted by

A. J. MACKY.

"This signature is witnessed by

M. F. WEST,
LEE KAHN.

"Leadville, Colo., August 27th, 1880."

It is further alleged that Bradford performed all the conditions of the contract, and surrendered the plaintiff to Macky, who took her from her father's home in Leadville to his own home in Boulder, wherein she resided continuously as Macky's child until she was twenty-two years of age; that the Mackys sent the plaintiff to the public schools in Boulder and caused her to be enrolled therein under the name of May Macky, and introduced her to their friends and acquaintances as their daughter, and she was so known for the fifteen years she resided in the home of the said Mackys; that plaintiff, for a period of eight years, performed the household work in the home of the said Mackys, and nursed and

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cared for Mrs. Macky, who was then feeble and at times unable to care for herself, and in all respects performed the conditions imposed upon her by the terms of the contract aforesaid; that Andrew J. Macky failed to perform the conditions imposed upon him by virtue of the said contract, and wholly disregarded the rights of the plaintiff in the premises, leaving and bequeathing to her no portion of his estate whatever, all of which appears from his last will and testament set forth in the complaint; that said will was made and executed in fraud of the rights and interests of the plaintiff, created by, and arising out of, said contract; that since the last will and testament of Macky was probated and letters testamentary issued to said Wilson, as executor, the latter has made distribution thereunder of the specific legacies named in the will, except to the County of Boulder, which claims $50,000; that he has also, since the commencement of this action, distributed to The Regents of the University of Colorado, the residuary legatees named in said will, the greater portion of the estate amounting in value to more than $300,000; that said legatees are expending large portions of the amount so distributed and received, and will continue to do so unless restrained by order of the court; that defendant Wilson, as executor, still has in his possession about $100,000 belonging to the estate which he will distribute under the terms of the will unless prevented by order of the court. It is further alleged that plaintiff had no knowledge of the contract in question, which had been kept from her designedly and fraudulently by the said Macky, until the 9th day of September, 1909, long after the said will had been admitted to probate, and subsequent to the expiration of one year after the date that letters of administration were granted the executor and that she was, therefore, wholly unable to file or present a claim against the estate, if it was her duty so to do, in the County Court in said county for allowance or rejection within the period of one year after the granting of such letters of administration, and should not by rea-

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son of said facts and circumstances be prejudiced in the assertion and maintenance of her cause of action.

The prayer of the complaint is for specific performance of the contract; that plaintiff be decreed one-third of the Macky estate; that pending a determination of the matter, the executor be restrained from making further distribution of the estate, and The Regents of the University restrained from making further expenditures of the portion of the estate by them received. While specific grounds of demurrer were embodied in the pleadings filed by the executor and the Board of County Commissioners, that of The Regents of the University was solely upon the ground that the complaint failed to state facts sufficient to constitute a cause of action, and if it be not vulnerable to that objection, it is conceded the judgment must be reversed. The Board of County Commissioners has filed no brief in this court. Indeed, its interest in the estate has been eliminated by the judgment in *Robbins v. County Commissioners,* 50 Colo. 610.

Mr. JUSTICE WHITE delivered the opinion of the court:

1. The trial court held that plaintiff's cause of action was barred by the statute of non-claim. The holding was based upon an erroneous conception of what constitutes a "demand" against the estate of a deceased person within the meaning of the statute. While the import of the word "demand" is very comprehensive when used in certain connections and in reference to certain matters, it is essential, in applying the statute here involved, to first ascertain the sense in which the word is *therein* used. The statute is found in the fourth paragraph of § 7206 R. S. 1908, the same being § 121 of an act entitled: "An act in relation to probate matters, including estates of minors, deceased persons and persons mentally incompetent, and the administration thereof, and to repeal certain acts in relation thereto." Chap. 181, S. L. 1903. The statute requires that "all demands" against the estate of deceased persons shall be divided into four specific classes, and paid in the order

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of their classification; that money received by the deceased as executor, administrator, guardian, conservator or trustee shall constitute the first class; that funeral expenses, physician's bill and other expenses of last illness of the deceased, and expenses of the administration and settlement of the estate shall constitute the second class; that allowances to the widow or orphans made as provided by law shall compose the third class; that "all debts and demands of whatsoever kind, without regard to quality or dignity" not within the first, second and third classes, filed in the County Court within one year from the granting of letters, and allowed by the court, constitute the fourth class, and that all demands not filed within such year shall be forever barred "unless such creditor shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case his claim shall be paid *pro rata* out of such subsequently discovered estate," providing "that any claims secured by valid mortgage, * * * may be filed and allowed after the expiration of one year."

The act is arranged in subdivisions and the non-claim statute is found in a subdivision entitled: "Allowance of claims of widows, orphans and creditors." The first section of the subdivision, being section 7205 of the act, relates to insolvent estates, while the next section thereof, being section 7206, includes the non-claim statute, and classifies "demands" against estates. Now, in the classification of the "demands" the claims of widows or orphans constitute the third class, while all other demands, that is, the first, second and fourth classes, must be demands of "creditors," the only other claimants named in the title of the subdivision. It would, therefore, seem that the "demands" referred to in the first line of section 7206, *supra,* are solely the "claims" referred to in the title of the subdivision, namely, the "claims" of widows, orphans and creditors. Other sections of the act strengthen this view. Section 7208 makes it the duty of the executor to fix a date within six months

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from the granting of letters for the "settling and adjusting of all claims." He is required to give notice thereof by publication, etc., "requesting all persons having claims and demands against the estate to present the same to the court on the day or days named in such notice for adjustment." Section 7209 authorizes persons having claims against the estate to file the same, and the court to proceed to a hearing thereon, but provides that if no objection be made to such claim "the claimant shall be required to swear that such claim is just and unpaid after allowing all just credits." Section 7216 provides that the court shall class "all demands allowed against any estate at the time of allowance thereof, and such demands shall be paid in their order, commencing with the first class, and when the estate is insufficient to pay the whole of the demands, such demands in any one class shall be paid *pro rata,* * * *" Section 7218 provides that "*any creditor* whose debt or claim against the estate is not due may, nevertheless, present the same for allowance and settlement," and section 7234 provides that, "Whenever it shall appear that there are sufficient assets to satisfy all legacies and all demands against the estate, the court shall order the payment of all legacies mentioned in the will of the testator, the specific legacies being first satisfied."

It seems clear from the different sections of the act, taken and construed together, as well as from the nature and reason of the case, that the words, "all demands against the estate," as used in the statute, do not include a claim of the nature of the one forming the basis of this suit. The contract before us contemplates that the "demands" of the statute, of all classes, should be satisfied in full out of the estate before the plaintiff herein should receive anything whatever. This is true, because that which she should receive by its terms was to be vested by the will of Macky. Such means of conveyance necessarily limits the estate, and the final investment of title, to that which is left after "all demands against the estate," as defined in the statute, have been

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satisfied. Moreover, if the rights of the plaintiff under the contract fall within "demands" of the fourth class, as prescribed by the statute, and are subject to its disabilities, such rights would likewise be subject to the benefits of the statute, and would, therefore, *pro rate* with other claims of the same class if the estate were insufficient to pay the whole of the demands. Section 7216, *supra.* To include the rights arising by virtue of the contract in question within the purview of the words "demands against the estate" would destroy all distinction between creditors of the estate, on the one hand, and those entitled as distributees thereof, after the payment of its debts, on the other. In construing a statute, courts, if possible, consistent with the reasonable meaning of the words employed in their association with the language of the whole act, ascribe to it a meaning that will avoid absurd results and far reaching evil effects in its application. The difference between a "demand against the estate," within the meaning of the statute, and the rights of the claimant under a contract like the one at bar, is radically and sharply defined. The former is a demand against the estate which must be paid or satisfied in advance of distribution, while the latter is a right or interest in the estate, an equitable ownership therein, after the claims against the estate have been allowed and paid.

When considered in connection with the statutes and the facts there involved, *Furman v. Craine,* 18 Calif. App. 41, 121 Pac. 1007, and *Burns v. Smith,* 21 Mont. 251, 261, 53 Pac. 742, 69 Am. St. 653, support our views here expressed upon this branch of the controversy. Moreover, the cause of action here set forth must be prosecuted, if at all, in a court of original and general equitable jurisdiction and powers. Its purpose is to impress a trust upon the real and personal property of the deceased after his debts are paid and the costs of administration discharged. The necessity for the interposition of equity is quite obvious. As said in *Owens v. McNally,* 113 Calif. 444, 450, 45 Pac. 710, 712, 33 L. R. A.

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369: "Plaintiff has rendered service of extraordinary and exceptional character,—such service as, in contemplation of the parties, was not to be compensated for in money, and as, in contemplation of law, cannot be compensated for in money. Therefore by no action at law could a plaintiff be restored to his original position. It would be in the nature of a fraud upon him to deny him any relief, and, the law failing by reason of its universality, equity, to promote justice, makes good its imperfections." Citing, Waterman, Spec. Perf. Cont., section 41; Pomeroy Spec. Perf., section 114. These principles have heretofore been recognized and applied in this jurisdiction as well as in others.—*Marshall v. Marshall,* 11 Colo. App. 505, 53 Pac. 617; *Currier v. Johnson,* 19 Colo. App. 94, 106, 73 Pac. 882; *Carl v. Northcutt,* 48 Colo. 47, 108 Pac. 994; *Peterson v. Est. of Bauer,* 76 Neb. 652, 659, 107 N. W. 993, 111 N. W. 361.

But defendants in error contend that notwithstanding the nature of the action, the County Court in probate had sole jurisdiction in the premises. The contention is based upon the provisions of sections 7254 and 7141 to 7146, R. S. 1908. The former section provides that questions of law and fact relating to probate matters or arising in proceedings under that act, shall be determined by the County Court, and grants the right of appeal from final judgments therein entered to certain designated courts, while the latter sections empower the County Court, upon petition of any party in interest, to require the specific performance of written contracts entered into by a testator or intestate to convey real estate. It can not properly be said that a suit to enforce specific performance of a contract to leave property by will, relates to probate matters or proceedings therein. Nor does the fact that the latter sections empower the County Court to enforce contracts for the conveyance of land entered into by the deceased, deprive the District Court of its jurisdiction in equity matters conferred by the Constitution. The District Courts are invested by the Constitution, sec. 11, art. VI, with original juris-

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diction of all causes both of law and in equity. Therefore, if the sections of the statute relied on had attempted, which they have not, to create of the County Court an exclusive original forum for the determination of such matters, a serious question would arise as to their constitutionality.

Of the jurisdiction of such constitutional courts of equity and the power of the legislature to interfere therewith, Mr. Beach, at section 1033 in his work on Modern Equity Jurisprudence, says:

> "The jurisdiction of chancery over decedents' estates is well established, but in the several states of the Union special courts having jurisdiction over such estates have been generally established called probate courts, orphans courts, surrogate courts, and the like; and these possessed by statute nearly all the powers formerly possessed by the courts of chancery and ecclesiastical courts in England. Courts of equity have, however, concurrent jurisdiction; and although their equitable jurisdiction may have been displaced in ordinary cases by the probate system, yet it is not abrogated by statutes conferring jurisdiction on probate courts. And it has been held that an act providing that probate judges shall have exclusive original jurisdiction in matters concerning decedents' estates is void as in contravention of an organic act conferring upon other courts chancery as well as common-law jurisdiction."

Whether this view of the matter is right or wrong, it is not necessary now to determine as we have no doubt that the statute in no wise takes away the jurisdiction of the District Court in the premises. In discussing the question of jurisdiction Mr. Pomeroy, in sec. 1153, vol. III of his work on Equity Jurisprudence, says:

> "One fundamental principle should be constantly kept in mind; it underlies all particular rules, and furnishes the solution for most of the special questions which can arise. In all those states which have adopted the entire system of equity jurisprudence, whatever be the legislation concerning the

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powers and functions of the probate courts, and whatever be the nature and extent of the subjects committed to their cognizance, the original equitable jurisdiction over administrations does and must still exist, except so far and with respect to such particulars as it has been abrogated by express prohibitory *negative* language of the statutes, or by necessary implication from *affirmative* language conferring exclusive powers upon probate tribunals. This equitable jurisdiction may be dormant, but except so far as thus destroyed by statute, it must continue to exist, concurrent with that held by the courts of probate, ready to be exercised whenever occasion may require or render it expedient. This general principle, so familiar, so fundamental, running through all branches of the equitable jurisdiction, but so often lost sight of by American courts in dealing with the jurisdiction as applied to administrations, was admirably stated by one of the ablest of American judges: 'There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. It is a matter of common experience that two or more courts may have concurrent powers over the same parties and the same subject-matter. Jurisdiction is not a right or privilege belonging to the judge, but an authority or power to do justice in a given case, when it is brought before him. There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the powers which it before possessed. Creating a new forum with concurrent jurisdiction may have the effect of withdrawing from the courts which before existed a portion of the causes which would otherwise have been brought before them; but it cannot affect the power of the old courts to administer justice when it is demanded at their hands.'"

2. The contract in question does not purport to create a relation between the promisor and the plaintiff whereby the latter would receive property under the law of inheritance from the former, but seeks to create a direct contractual relation wholly independent of such

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laws and the adoption statutes. Therefore, certain questions, difficult of solution, found in many cases are not here involved. Plaintiff's right to relief, if any, rests upon the obligation assumed by Macky in the contract with her father, and must be measured and determined by well known principles of law and rules of construction. It is elementary that a valid agreement may be made on a good consideration to give property by will.—*Krell v. Codman,* 154 Mass. 454, 28 N. E. 578, 14 L. R. A. 860, 26 Am. St. Rep. 260; *Johnson v. Hubbell,* 10 N. J. Eq. 332, 66 Am. Dec. 773; *Van Duyne v. Vreeland,* 12 N. J. Eq. 142; *Wright v. Tinsley,* 30 Mo. 389; *Gupton v. Gupton,* 47 Mo. 37.

In *Rivers v. Rivers,* 3 Desau, 190, 4 Am. Dec. 609, in sustaining the propriety of a court of equity recognizing such agreement, it is said, that:

> "A man may renounce every power, benefit or right which the laws give him, but he will be bound by his agreement to do so, provided the agreement be entered into fairly, without surprise, imposition or fraud, and it be reasonable and moral."

While in *Johnson v. Hubbell, supra,* the rule is stated as follows:

> "There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by a conveyance to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man, in this way, to embarrass himself as to the final disposition of his property, but he is the disposer, by law of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement upon the recognized

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principles by which it is governed in the exercise of this branch of its jurisdiction."

It is equally elementary that a contract to leave by will property to a child in consideration of his living with the promisor, will, when the contract meets all of the requirements, be specifically enforced after the promisor's death, it having been fulfilled on the part of the promisee.—*Burns v. Smith, supra; Sutton v. Hayden,* 62 Mo. 101; *Sharkey v. McDermott,* 91 Mo. 655, 4 S. W. 107, 60 Am. Rep. 270; *Moline v. Carlson,* 92 Neb. 419, 138 N. W. 721.

Indeed, in a note to *Baumann v. Kusian,* 44 L. R. A. (N. S.), 756, 763, it is said that, no cases are opposed to such holding as a general principle, provided that the property is to be conveyed by any means except by operation of the inheritance laws; and that most courts interpret nearly all such contracts so as to give effect to the real intention of the parties, some courts construing contracts for mere adoption in that liberal way.

Counsel on either side concede this to be the law. It is claimed, however, by defendants in error, that this contract fails to meet many of these requirements; that it lacks adequacy of consideration and mutuality; that it is unjust and unfair in its terms, and is so uncertain and indefinite that a court of equity should decline to enforce it. In considering some of these objections it is well to bear in mind that the contract obligates the promisor to leave property to a child, in consideration of her living with him as his child, rather than as compensation for services to be rendered by her, and that it has been fully performed by the latter. As no definite money value can be fixed for the society, companionship and filial obedience of a child, or to a parent's sacrifice in giving up his child to another, which is the real consideration in such contracts, courts will not inquire into the adequacy of the consideration when the promisor has fully received and enjoyed the benefits of the contract. As said in *Haubrich v. Haubrich,* 118 Minn. 394, 397, 136 N. W. 1025, 1026:

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"The law applicable to these questions is too well settled to justify any extended discussion. A party to a contract may obligate himself to make his will in a particular way, or to give specific property at his death to a particular person, so as to bind his estate; * * * Specific performance of the contract will not be enforced, where the consideration is labor and services which may be estimated and their value liquidated in money; but where the consideration is that the promisee shall assume a peculiar and distinct relation to the promisor, and the services are of such a character that it is practically impossible to estimate their value by any money standard, specific performance will be decreed."

The identical question was considered and ruled in *Healey v. Simpson,* 113 Mo. 340, 346, 20 S. W. 881, 883. There a written contract for the adoption of a chilld was held invalid because not executed in conformity with the laws of the state, yet as the contract also provided that the child should have and inherit from the estate of the promisors in the same manner and to the same extent that a child born of their union would inherit, such part of the contract would be specifically enforced in favor of the heirs of the promisee against the heirs of the promisors, and upon the question of consideration, said:

"The surrender by the mother of all control of the child, and the services and companionship of the latter constituted valuable considerations for the promise of Brewster and his wife, that she should 'have and inherit from the estate of said parties * * * in the same manner and to the same extent that a child born of their union would inherit.' The influences of a child of tender years in the home circle are too sacred and holy to be estimated in dollars and cents. And, when the mother sent her child to dwell in another family in a distant state, she yielded much of affection and love, and Brewster by the same act gained the companionship of one who added much no doubt to his enjoyment of life. The sundering of natural ties and the formation of artifical ones for the enjoyment and gratification of

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the party at whose instance this is done, is held, and ought to be held to be such a consideration as the courts will recognize as valuable where the other party has in good faith acted on and carried out the agreement on his part. This is upon the principle that the parties can not be put *in statu quo*. In the very nature of things nine years in the life of a child so changes conditions that it is out of the power of an earthly tribunal to restore the parties to their original situation and environment, and the courts therefore compel them to stand upon and abide by the record they have made."

In *Chehak v. Battles,* 133 Iowa, 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1130, 12 Ann. Cas. 140, applying the same rule, it is said:

"The surrender of a child by its parent to another, who at the time agrees to adopt the child as his own, or to devise property to or to make him his heir, is generally held as a valid consideration; and, as it is made for the benefit of the child, he may maintain an action for specific performance."

The rule is stated in *Jaffee v. Jacobson,* 48 Fed. 21, 1 C. C. A. 11, 24, 14 L. R. A. 352, 356, as follows:

"* * * a court of equity will specifically enforce a promise to leave to another the whole or a definite portion of one's estate as a reward for peculiar personal services rendered, or other acts done by the promisee, which are not susceptible of a money valuation, and were not intended to be paid for in money, provided the consideration has been substantially received at the promisor's death; and it is no objection to the enforcement of such a contract that it was entered into with a third party for the promisee's benefit if the latter has acted under it and executed it. Such seems to be the substance of the rule fairly deducible from the authorities cited, and relied upon by appellant's counsel." Citing *Rhodes v. Rhodes,* 3 Sandf. Ch. 279, 7 L. Ed. 852; *Van Dyne v. Vreeland,* 11 N. J. Eq. 371; *Sutton v. Hayden,* 62 Mo. 102; *Sharkey v. McDermott,* 91 Mo. 648, 8 West. Rep. 4 S. W. 107, 60 Am. St. 270, 737; *Haines v. Haines,* 6 Md. 435; Pom. Cont. section 114.

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Under the facts here pleaded we are certain the contract in question can not be avoided on the ground of inadequacy of consideration. Neither is it vulnerable to the objection of the want of mutuality. Its every condition and obligation on the part of plaintiff, as disclosed by this record, had been fully performed long prior to the death of Macky. The rule in this regard is tersely stated in *Oswald v. Nehls,* 233 Ill. 438, 445, 446, 84 N. E. 619, as follows:

> "It is next insisted by appellants that the contract in question is wanting in mutuality and for that reason a specific performance should be denied. This contention cannot be sustained. The general rule is, that before specific performance of a contract will be decreed it must appear that there was mutuality, both in the obligation and remedy, under the contract, as long as the contract remains executory on both sides. (Waterman on Spec. Perf., sec. 196; Page on Contracts, sec. 1621; *Lancaster v. Roberts,* 144 Ill. 213, [33 N. E. 27]; *Welty v. Jacobs,* 171 Ill. 624, [49 N. E. 723, 40 L. R. A. 98]; *Bauer v. Lumaghi Coal Co.,* 209 Ill. 316, [70 N. E. 734]. But this rule has no application to contracts in which the provisions which could not be enforced specifically have been fully performed. Contracts for personal care and attention or personal services can not usually be enforced specifically. However, when personal care and attention or personal services have been fully performed, and the circumstances are such that to deny specific performance would leave the party with an injury that could not be adequately compensated in damages, equity will grant a specific performance of the remaining provisions of the contract."

Contrary to the contention of defendants in error, we see nothing in the record to justify the conclusion that the contract is unjust and unfair. It does not appear to be oppressive, one-sided, unconscionable or in any wise affected by inequitable features, nor can we discover that its enforcement would result in wrong or injustice. Men must be just, and honestly discharge their

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legal obligations, before they can be lawfully permitted to be generous. In equity their actions are tested in the crucible of good faith and conscience, and decrees are molded so as to measure out justice to all concerned. As said in *Johnson v. Hubbell, supra,* p. 338: "If A. enters into an agreement, for which he receives a good consideration, with B., to give him his property by will, and in violation of his agreement he gives it, by his will, to C., the court will declare C. a trustee for B. In doing this, it does C. no wrong. A. having undertaken to make to C. a voluntary gift of that which he had no right in law so to dispose of, the court does C. no injustice, and violates none of his rights, by declaring him a mere trustee. To permit C. to hold the property as against B., the court would sanction the fraud which A. had committed in disposing of the property in violation of his agreement."

When we consider the contract before us, together with the circumstances of the contracting parties, we are satisfied that the material terms thereof are expressed with sufficient clearness and definiteness to enable us to ascertain the intent of the parties, and that a decree may be framed in accordance with such intent. Of this there can be no reasonable doubt, when we keep in mind the rules established by courts of equity in dealing with such matters, together with the fact that plaintiff has fully performed the contract on her part and the impossibility of measuring the value of her acts in that behalf by any money standard. As said in *Work v. Welsh,* 160 Ill. 468, 473, 43 N. E. 719, 722:

> "It is only necessary that the terms of a contract 'be expressed with reasonable certainty, and what is reasonable in any case must depend upon the subject matter of the contract, the purpose for which it was entered into, the situation and relations of the parties, and the circumstances under which it was made.' (Pomeroy on Contracts, section 159.) Equity will only require a reasonable certainty in a contract sought to be enforced, and if the meaning, taken as a whole, is intelligible to the court, specific performance will be decreed."

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> Moreover, "When a contract has been partly performed by the plaintiff, and the defendant has received and enjoys the benefits thereof, and the plaintiff would be virtually remediless unless the contract were enforced, the court, from the plainest considerations of equity and common justice, does not regard with favor any objections raised by the defendant merely on the ground of the incompleteness or uncertainty of the agreement."—Pomeroy on Contracts, section 5, p. 208.

Indeed, in speaking of this character of cases, Lord Camden, in *Durour v. Perraro,* Hargreave's Judicial Arguments, 304, declared that a person, by promising to give property by will, thereby bound his assets and became a trustee for the performance of the agreement, transmitting that trust to those who claim under him, and that: "There is not an instance to be found since the jurisdiction was established where one man has ever been released from his engagement after the other has performed his part." The direct purpose of the agreement in issue, plainly expressed, was to afford Macky the society, companionship and filial obedience of a child in his household, and to secure to that child a good home and a definite portion of Macky's estate upon distribution thereof. His direct obligation to the child, in that regard, is clearly set forth therein, twice restated, and made more specific. In one clause is the obligation to maintain and provide for her during her life, the manner and extent thereof to be appropriate and reasonable in proportion to his income and available means. How this duty was to be performed is not specified in this clause. The contract, however, subsequently restates the obligation, and binds Macky to make actual and careful provision for plaintiff's future welfare and maintenance by preparing and having in his possession, at all times, a legally executed and valid will in which he was required to name "all money, property and securities existing under his own right and title and comprising his individual assets, together with a specific enumeration for the disbursement and distribution of the same";

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and in which he shall bequeath to the plaintiff "a portion amounting in the minimum to or sum equal to not less than one-third (1-3) of the valuation of his entire estate." In *Roehl v. Haumesser,* 114 Ind. 311, 15 N. E. 345, it was held that a contract to devise "one-half of my estate" applies to such property of all kinds as the person so contracting may have subject to disposition by will at his death, and is not void for uncertainty of description. So, in the case at bar, a court can readily determine with certainty, by the aid of extrinsic admissible evidence, every article of Macky's estate and its value, and, having done so, it has identified the estate. Should we assume, as defendants in error contend, that the obligation contemplated the selection by Macky of specific articles or securities for the plaintiff, we do not think it would render the contract non-enforceable in equity. In any event, the articles selected would necessarily be from his assets subject to the prior payment of his debts. Therefore, the agreement, in legal effect, creates a trust in his estate in favor of plaintiff for the one-third part thereof. For had he actually named in his will "all money, property and securities existing under his own right and title" and bequeathed to plaintiff particular articles thereof, it would not be a fulfillment of his obligation, unless such articles in value equaled, substantially, one-third of his entire estate, and, under such circumstances, a court of equity would subject other portions of the estate to discharge the trust.—*Rivers v. Rivers, supra, Offutt v. Offutt,* 106 Md. 236, 67 Atl. 138, 12 L. R. A. (N. S.) 232, 124 Am. St. 491.

Furthermore, the requirement or right reserved in that respect, if there be such, is only incidental to the main obligation to bequeath to her the one-third part of his estate, and in carrying out the trust, will be performed by the court or disregarded. The principle applied, is, that when the chief purpose of a contract is manifest and can be enforced, form shall not be allowed to destroy substance, merely because there exists an im-

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possibility to carry out some collateral or subsidiary agreement according to its precise terms; especially when the contract has been performed by the party seeking its enforcement and he is in no sense responsible for the failure concerning the collateral or subsidiary agreement. In *Joy v. St. Louis,* 138 U. S. 1, 43, 34 L. Ed. 843, 11 Sup. Ct. 243, 255, there was under consideration a provision in a contract between a railroad company and city park commissioners for the use of a right of way by other railroad companies. The suit was for specific performance, and it was objected that the contract was too uncertain to warrant the relief, and, because of failure to agree upon the compensation, it was contended that the contract could not be enforced specifically, and an attempt to do so would be the making of a new contract by the court and the enforcement of it. Upon this point it is said: the contract

> "provides that the County company 'shall permit' other railroads to use its right of way. This is to be done 'under such reasonable regulations and terms as may be agreed upon,' and 'upon such terms and for such fair and equitable compensation to be paid' to the County company 'therefor as may be agreed upon by such companies.' Not only are the regulations and terms to be reasonable, but the compensation is to be fair and equitable. Although the statement is that the compensation is to be such 'as may be agreed upon by such companies,' yet the statement that it is to be 'fair and equitable' plainly brings in the element of its determination by a court of equity. If the parties agree upon it, very well; but if they do not, still the right of way is to be enjoyed upon making compensation, and the only way to ascertain what is a 'fair and equitable' compensation therefor is to determine it by a court of equity. Such is, in substance, the agreement of the parties. The provision cannot be construed as meaning that, if the parties do not agree, there is to be no compensation, and that, because there can in that event be no compensation, there is to be no enjoyment of the right of way. In this view, it cannot be said that

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the court is making an agreement for the parties which they did not make themselves."

So, here, if a proper construction of the contract be that Macky therein reserved the right to designate the particular articles of his estate that plaintiff should receive by his will, it was, nevertheless, coupled with the obligation that in no event should it be in value less than one-third of the entire estate, which clearly brings in the element of its determination by a court of equity. If he made the selection and it equaled the value designated, his obligation in that regard was performed. But as he made no selection, the main obligation to leave her a portion of his estate amounting in the minimum to or sum equal to not less than one-third of the valuation of his entire estate will be enforced, if impervious to other objections, as a court of equity can readily segregate the entire estate into three parts of equal value and no injury could possibly result therefrom. The provision can not be held to mean that if he failed to make the selection that thereby plaintiff was to have no compensation, and the estate be discharged of the trust created for her benefit.

In *Dinham v. Bradford,* L. R. 5 Ch. App. 519, 522, 523, a partnership agreement provided that at the end of the partnership, one partner should purchase the share of the other at a valuation to be made by two persons, one named by each. It was held that as the valuation could not be so made, as no umpires had been selected, the court would, nevertheless, carry the agreement into effect by ascertaining the value of the share, Lord Hatherly saying:

"There was one clear and manifest object of this agreement. * * * Here is a man who has had the whole benefit of the partnership in respect of which this agreement was made, and now he refuses to have the rest of the agreement performed on account of the difficulty which has arisen. It is much more like the case of an estate sold, and the timber, on a part, to be taken at a valuation, the adjusting of matters of that sort forming part of the

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> arrangement, but being by no means the substance of the agreement; and in such cases the court has found no difficulty. If the valuation can not be made *modo et forma,* the court will substitute itself for the arbitrators. It is not the very essence and substance of the contract, so that no contract can be made out except through the medium of the arbitrators. Here the property has been had and enjoyed, and the only question now is, what is right and proper to be done with regard to settling the price?"

But, it is said there is serious uncertainty in respect to the portion of Macky's estate which the plaintiff was to have and receive, arising by reason of the qualifying words "in the minimum" and "not less than" as therein used, an intent being evidenced to leave to Macky's future determination the fixing of the maximum portion of his estate to be left to plaintiff. If such intent be evident, it is, nevertheless, certain that the minimum amount or value is fixed, and, therefore, the obligation is certain. What he might be at liberty to do in no sense makes uncertain that which he specifically obligated himself to do. In other words, he bound himself to leave to plaintiff the one-third portion of his estate; no more, no less. The word "portion" is clearly used in reference to the estate which he might have at the time of his death, and the language fixing the value thereof designates with sufficient certainty the particular share therein that plaintiff should have and receive. If it be true that such share might possibly be a sum of money, it is of no particular consequence. In any event, it was to be a portion of the estate, and must be taken therefrom, and the promisor being dead, the court will impress the trust upon the estate. Indeed, it has been held that in a case of very clear equity in plaintiff and the remedy at law, precarious, a bill for *damages* might be sustained.—*Phillips v. Thompson,* 1 John's Ch. 131; *Gupton v. Gupton,* 47 Mo. 37, 47; *Wright v. Tinsley,* 30 Mo. 389, 399.

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The case is unlike that of an agreement to leave by will a particular tract of land which the promisor subsequently conveyed by deed to another possessing no knowledge of the previous agreement. In such case the land would be beyond the reach of the promisee and no trust could be impressed thereon. Here the agreement relates to the estate which at his death becomes a readily ascertainable entity, and the trust may be easily impressed thereon. In *Wright v. Tinsley, supra,* in directing a decree for specific performance, it is said:

> "The agreement here is that the plaintiff's children shall have an equal share of the testator's estate. This estate is alleged to be of the value of some $12,000 after the payment of debts, and, with the exception of one piece of town property, worth about $3,000, consists of money and personal property. The conversion of the property into money by a sale for the purpose of distribution among the legatees, interposes no obstacle to the execution of the agreement according to its essential terms. The incapacity of the defendants to perform the contract literally and exactly, in all its parts, is no bar to a performance; if it can not be performed literally, it may yet be performed as to its substantial requirements."

We see no substantial difficulties in the enforcement of this contract, but were it otherwise we would adopt the suggestion in *Wilson v. The Furness Ry. Co.,* 9 L. R. Eq. Cases 28, 33, and earnestly endeavor to overcome them to the end that a grievous wrong be righted. In that case a demurrer was interposed to a bill which prayed specific performance by the railroad company to construct a railroad and a wharf. It was claimed that the contract was too vague in its terms for enforcement, and the Chancellor said:

> "The demurrer must be overruled. * * * It would be monstrous if the company, having got the whole benefit of the agreement, could turn round and say; 'This is the sort of thing which the Court finds a difficulty in doing, and will not do.' Rather than allow such a gross piece of dishonesty to go un-

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redressed, the Court would struggle with any amount of difficulties in order to perform the agreement."

So, in the case at bar, every consideration of equity, justice and good conscience requires us to direct that the demurrer be overruled and the defendants ruled to further plead in the premises. While a party may not demand the specific performance of a contract as a matter of right, for the exercise of this power rests in the sound discretion of the court in view of all the surrounding circumstances, nevertheless, as said in a note to *Bennett v. Burkhalter,* 44 L. R. A. (N. S.) 733, 734, it is not solely a stumbling block to the complainant, "but in practice it may help him if his cause is just. It is a two-edged sword almost sure to bring destruction to the party whose cause is out of harmony with the judicial conscience."

3. It is further contended that the complaint is insufficient in that it contains no description of the property belonging to Macky's estate. As the purpose of the suit is to enforce the contract by impressing a trust upon his estate as contradistinguished from having particular property conveyed to plaintiff, it is not certain that a detailed statement of such property is required to be set forth in the complaint. And, as the objection was not urged in the court below and only presented here in a supplemental brief, we decline to notice it further. If it had been urged in that tribunal by a motion to make more specific, which would have been the proper pleading, the complaint could have been readily amended in that regard, and we decline to deprive plaintiff of her substantial rights upon such technicality so presented.

4. The alleged defect of parties, which is raised by the demurrer of the executor, was not passed upon by the trial court, and we shall consider it very briefly here. If the beneficiaries under the will were of the same class, the matter would present a serious question, but the bulk of the estate goes to residuary legatees, all of whom are parties to this suit. Under these circumstances, the

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bringing in of the other legatees could in no wise be of benefit to, or concern the demurring defendant. The rule applicable here is stated in *Pollard v. Lathrop,* 12 Colo. 171, 175, 20 Pac. 251, 253, as follows:

> "The provision requiring other parties to be brought in, where a complete determination of the controversy cannot be had without their presence, has been held to apply to cases 'where there are other persons not parties whose rights must be ascertained and settled before the rights of the parties to the suit can be determined.' *McMahon v. Allen,* 12 How. Pr. 39, 45. This has reference to the necessary parties to the action; that is, to such parties as are indispensable."

While, no doubt, it would have been proper and, perhaps, wise to have joined, as defendants, all the legatees under the will, still the rights of the residuary legatees can be ascertained and settled in this suit without the presence of the others, and the case may proceed. Nevertheless, the objection, like that considered under subdivision 3, may be entirely eliminated by amendment of the complaint, if the plaintiff so desires. The judgment is, therefore, reversed and the cause remanded.

Judgment reversed and remanded.

CHIEF JUSTICE MUSSER and Mr. JUSTICE BAILEY concur.

Decided April 6, A. D. 1914: Rehearing denied June 1, A. D. 1914.

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[No. 7359.]

LEONARD V. HALLETT.

1. CONTRACT—*Assent—Evidence.* Plaintiff had negotiated the purchase, by a third party, of lands of defendant. By the terms of his agreement with the defendant he was to receive $20,000 from the purchase money. The purchaser having defaulted in sundry payments, plaintiff, at his instance, solicited from defendant an extension of time to the purchaser. Defendant advised plaintiff that if he should grant the extension he would allow him but $10,000 out of the proceeds. Plaintiff strenuously objected, but declared that he was powerless and would be compelled to submit. Defendant finally granted the extension, the purchase was completed, and the purchase money paid in installments, upon each of which plaintiff receipted for a sum equal to his share of the payment, on the basis that his total interest was $10,000. *Held* to fully establish plaintiff's assent to the abatement of his interest in the purchase money; that the transaction was in effect a substitution by all parties of a new agreement for the old one. The new contract was a sufficient consideration for the abrogation of the old one. *Held* further that the original agreement by which plaintiff was to receive $20,000 from the purchase money did not create any fiduciary relation between plaintiff and defendant; that in the new contract each was dealing for himself, and defendant was under no disability arising from the previous agreement. (278, 280)

2. ——*Consideration.* A promise without consideration to release one from a fixed liability is *nudum pactum.* (278)

3. PROTEST—*Effect Upon Subsequent Agreement.* A protest against a proposed arrangement, followed by a full assent thereto, is without effect. (279)

4. VENDOR AND VENDEE—*Default in Payments—Effect.* Where an agreement for the sale of lands provides that upon the purchaser's default to make the stipulated payments, at the dates appointed, the default shall, at the vendor's option annul the contract, the vendor is under no obligation to convey, after such default. (280)

Error to Denver District Court.—Hon. CARLTON M. BLISS, Judge.

Mr. LUTHER M. GODDARD and Mr. GEORGE D. TALBOT, for plaintiff in error.

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Messrs. MACBETH & MAY and Mr. J. CUTHBERT TWEENEY, for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

This action was upon two alleged counts. The first pertains to oral contracts concerning the purchase and sale of certain lands. The second is based upon the theory of moneys had and received, and is intended to cover the same transaction. Both were put in issue. The record discloses, that in 1890 the plaintiff in error and others entered into a parol agreement with George W. Clayton to purchase eighty acres of land. Under this agreement Leonard and his associates were to take possession of the land, have it surveyed and subdivided into blocks and lots. The purchase price was $130,000.00, to be paid as follows: a reasonable cash payment, and as the lots were sold Clayton was to deed to the respective purchasers and receive the money therefor, until the purchase price was paid, when he was to deed the remainder, if any, to the vendees. Under this agreement Leonard and associates entered into possession, expended considerable for improvements, and in having it subdivided into blocks, lots, streets and alleys. Up to June 1st, 1893, under this agreement, Clayton had received all of the purchase price except $29,000.00. At that time a large number of lots were unsold. By reason of financial conditions it was impossible to sell them, and nothing further was done under the contract for several years. In the meantime Leonard purchased the interest of his associates. Thereafter Clayton agreed with him that he might carry out the contract. Clayton died August 15th, 1899, leaving a will in which the plaintiff in error, Hallett, was named executor and trustee of his estate. Leonard asked Hallett if he would permit him to carry out the contract. Two or three weeks later Hallett informed him that he would carry out the agreement as made with Clayton. At this time Leonard stated to Hallett that he thought he could interest the

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Denver Realty Company in the property; that the realty company would pay what was due under the contract, with interest and taxes, and an additional amount to reimburse him, Leonard, for what he had spent in improving it, and that he wanted enough added to the amount owing the estate to partially reimburse him for what he had done. To this Hallett assented, and they mutually agreed to fix the purchase price of the property to the realty company at the sum owing the estate (which it was agreed was $29,000.00, with interest and taxes), plus $20,000.00, which latter sum was to be paid Leonard when the estate was paid the amount coming to it. By the efforts of Leonard, the Denver Realty Company and Hallett entered into a written contract for the sale of the lots at the price agreed upon by Hallett and Leonard. Under this agreement a payment was made of which Leonard, at his request, received his proportionate share, which amounted to $255.00. The realty company did not make its subsequent payments as provided. Leonard inquired of Hallett regarding the payments, and suggested that he had better write the officers of the company and stir them up. Several times during the eighteen months after the contract was made he called Hallett's attention to the matter, who said he had written the officers of the company, and that he would write them again. Nothing further, however, was done until October 9th, 1905, when in response to communications from Hallett the realty company requested Leonard to obtain an extension of time for the payment of the purchase price; they also opened negotiations with Hallett for an extension of time, or for a new agreement, which contemplated the payment of the price as originally agreed, with interest and taxes, less the amount that had already been paid. Leonard was instrumental in bringing about these negotiations, but was informed by Hallett while they were under way that if he did extend the time of payment he would allow him but $10,000.00 for his share instead of $20,000.00. Leonard strenuously objected to this saying, "I don't understand why; it is not your money, it is not Clayton's

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money, it is my money. I don't understand why you should take $10,000.00 from me, but you have got everything in your own hands, and I suppose you can and will do whatever you want to." A party present at the time of this conversation stated that Leonard said in substance that he would have to accept; that he was powerless.

This conversation occurred on October 16th, 1905, at which time it was agreed that Leonard was to receive interest up to that time on the $20,000.00 mentioned in the first agreement. On that date Hallett wrote the realty company that the offer to make a new agreement was acceptable, save the first payment, that he wished the interest on the amount due under the first contract and taxes advanced by him, paid, and that if this was done he would accept the purchase price in semi-annual installments of $20,000.00 each. This offer was accepted by the company, and a second agreement entered into between Hallett and the company for the payment of the purchase price as specified in the original agreement, with interest, less the initial payment made under the first agreement. When the interest on the purchase price under the first contract was paid, as specified in the Hallett letter, Leonard was paid interest on $20,000.00 from the date of the first contract down to the time the second was executed, less the amount paid him under the first contract, so that the sum he received when the first payment was made under the second agreement amounted to $4,950.00. The second contract was carried out by the realty company, and as the payments were made Leonard received payments representing his interest on the basis that his share of the purchase price was to be $10,000 and receipted from time to time therefor, and when the transaction was finally closed, thus receipted in full. Thereafter, Leonard brought this suit to recover the additional $10,000.00, which he claimed was due him, together with interest. At the close of the

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testimony, on motion, the court instructed the jury to return a verdict in favor of the defendant.

It is claimed that the testimony does not establish that Leonard assented to receive $10,000.00 under the second agreement, in lieu of the $20,000.00 he was to receive under the first. We think the evidence on this subject, which includes the receipt he gave from time to time, fully establishes that he did assent to receive the amount paid him under the second contract in full payment of the amount he was to receive from a sale of the property.—*Bassick Gold Mine Co. v. Beardsley,* 49 Colo. 275, 112 Pac. 770, 33 L. R. A. (N. S.) 852; *C., R. I. & P. Co. v. Mills,* 18 Colo. App. 8, 69 Pac. 317; 9 Cyc. 254; *United States v. Child & Co.,* 12 Wall. 232, 20 L. Ed. 360; *Treat v. Price,* 47 Neb. 875, 66 N. W. 834; *Fuller v. Kemp,* 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; *Reynolds v. Empire Lumber Co.,* 85 Hun. 470, 33 N. Y. Supp. 111; *Donohue v. Woodbury,* 6 Cush. (Mass.) 148, 52 Am. Dec. 777; *McDaniels v. Lapham,* 21 Vt. 222.

It is next contended that even if Leonard did agree to take $10,000.00 for his interest in the property, that such assent was without consideration, and therefore not binding on him. In support of this it is urged that Leonard fully performed all obligations imposed upon him by the original contract, and hence, a promise to Hallett to induce him to perform the unfulfilled part of his contract was without consideration. The general rule is that a naked promise to release a party to a contract from performance of that which he is already under obligation to perform by its terms, is not a valid consideration; for if the promisor gets nothing in return for his promise he has not obtained any benefit as a result of his promise. This rule, however, has no application to the facts here. At the time negotiations were pending for the second contract Hallett was not obligated to pay Leonard any part of the purchase money due under the first contract. It had not been paid, and Leonard was not to receive his share of the purchase price until the amount to be paid to the estate was first

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paid. The original contract was between the realty company and Hallett. It was entered into through the efforts of Leonard as a means whereby he would receive a consideration for his equity. The realty company did not comply with its terms. By mutual consent of all the parties concerned, a new contract was entered into between Hallett and the realty company. Before it was executed, and as a condition precedent to its execution by Hallett, he informed Leonard that he would not execute the second proposed agreement except upon condition that Leonard should take $10,000.00 for his interest in the property. In brief, Hallett and Leonard agreed at a time when neither was under obligation to the other, that if the second agreement was executed Leonard should be paid $10,000.00 for his interest in the lots. To this, although under protest, he assented, and the second agreement between Hallett and the realty company was thereafter executed. The negotiations which culminated in the execution of this contract were brought about through the efforts of Leonard. It was also in part for his benefit, as by a sale of the property to the realty company under this new contract, he would receive a consideration for his interest in it. The parties to a contract may discharge it by substituting a new one in its place. That is precisely what occurred. The original agreement between Hallett and the realty company was thereby annulled. Antecedent to this a new contract had been entered into between Hallett and Leonard to the effect that if the second agreement was executed and carried out, Leonard's share of the principal paid by the realty company was to be $10,000.00. In short new contracts were substituted for the originals. This was a sufficient consideration for their abrogation.—9 Cyc. 351, 354, 595; *Dreifus, Block & Co. v. Salvage Co.,* 194 Pa. 475, 45 Atl. 370, 75 Am. St. Rep. 704; *Stewart & Howell v. Keteltas,* 36 N. Y. 388; *Moore v. Detroit Locomotive Works,* 14 Mich. 266; *Rollins v. Marsh,* 128 Mass. 116; *Courtenay v. Fuller,* 65 Me. 156; *Coyner v. Lynde,* 10 Ind. 282; *Flegal v. Hoover,* 156 Pa. 276, 27 Atl. 162;

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Bishop v. Busse, 69 Ill. 403; *Connelly v. Devoe,* 37 Conn. 570; *Stoudenmeier v. Williamson,* 29 Ala. 558.

Even were these not new contracts but merely alterations of the former ones, such alterations would have been based upon a consideration under the written agreement between Hallett and the realty company made June 26th, 1901; as a condition precedent to Hallett's conveying the property, the realty company was to make certain payments on certain specified dates, and time was expressly of the essence of that contract. Unless these payments were made on the dates named, Hallett was under no obligation whatever to make the conveyance. The contract states that such a default should, at his option, constitute an annulment of the contract. The payments were not made on the dates when due and had not been made at all when in 1905 Leonard approached Hallett, at which time Hallett was in a position to say that he would not convey. His obligation to do so had ceased, his promise therefor to renew his obligation and to agree to convey the property on payment of certain sums was valid, and was a sufficient consideration to support Leonard's agreement to take a smaller sum than would otherwise be due him.—*Watson v. Elliott,* 57 N. H. 511; *Jaffray v. Davis,* 124 N. Y. 165, 26 N. E. 351, 11 L. R. A. 710; *Hutton v. Stoddart,* 83 Ind. 539; *Boyd v. Moats,* 75 Iowa 151, 39 N. W. 237.

It is urged that by the original agreement Hallett became the agent and trustee of Leonard; that the parties sustained this relation when the second contract was entered into with the realty company, and that therefore, Hallett had no right to exact any promise from his principal, or *cestui que trust,* for the performance of his duty as such agent or trustee. The testimony wholly fails to establish any such relation between the parties. The legal title to the lots was in the Clayton estate, or perhaps more accurately speaking, in Hallett as trustee for the estate. Leonard had a prospective equity in these lots. The original agreement was to sell this property for a sufficient sum to reimburse the estate for the

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amount due it, and leave Leonard $20,000.00. This did not create the relation of agent, trustee or principal. It was for the benefit of both, by which each would receive a consideration for his interest from a sale of the property. This contract was not carried out and a second one was entered into with the realty company, by which, under the contract entered into between Hallett and Leonard, before the second contract was made, Leonard, when the realty company contract with Hallett was carried out, was to receive $10,000.00 for his interests, so that each was acting for himself in the premises, under a mutual arrangement whereby each was to receive a specified sum or consideration for his interest in the lots.—Huffcut on Agency, (2nd Ed.), Sec. 218.

The judgment is affirmed.

Affirmed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

Decided April 6, A. D. 1914. Rehearing denied June 1, A. D. 1914.

[No. 7391.]

EMPIRE CONSTRUCTION COMPANY v. CRAWFORD ET AL.

1. JUDGMENT—*Final—Appeal.* Action by sub-contractors to enforce a mechanic's lien. An irrigation district, and the Empire Construction Company, as owners, and one Crawford, as original contractor, and sundry other sub-contractors and material men, were named as defendants. Crawford by cross-complaint prayed judgment against the Empire Company, and demanded a lien. The Empire Company by a cross-complaint to that of Crawford, prayed judgment against Crawford. A decree was entered denying any lien against the works of the Irrigation District, but declaring that Crawford was liable to the Empire Construction Company in a sum mentioned, that these moneys were subject to a lien in favor of the sub-contractors.

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The claims of certain sub-contractors were established, the construction company was directed to pay into court the moneys found to be due and owing by it to Crawford, and directions were given for the division of a portion thereof, after payment of the costs, among certain of the lien claimants. As to other lien claimants the cause was continued. Judgment was entered in favor of the construction company and against Crawford, and appeal allowed therefrom. More than a year after the entry of this decree, and more than six months after the adjournment of the term, Crawford filed a motion to vacate the judgment against him, upon the ground, among others, that no final judgment was given from which an appeal could have been taken. *Held* that under § 241 of the code made applicable to proceedings for the enforcement of a mechanic's lien, by Rev. Stat. § 4044, the separate controversy between the construction company and Crawford, all the parties to which were then before the court, was a proper subject of adjudication, and that the judgment recovered by the construction company was a final judgment, notwithstanding the continuance of the cause as to the other parties, and that an appeal lay therefrom. (287, 289)

2. ——*Vacating—Lapse of Term.* As a general rule, in the absence of a statute to the contrary, the courts have no control of their judgments after the lapse of the term at which the judgment is rendered, except to correct clerical errors, and to afford relief where fraud or the absence of jurisdiction is alleged. (290)

3. ——*Statute Construed.* Sections 81 and 231 of the code contain the only statutory authority for granting relief against a judgment after the expiration of the term at which it is rendered.

Where the jurisdiction is unquestioned, and no fraud in obtaining the judgment is alleged, the application under § 81 must be made with reasonable diligence, and in any event within six months after the adjournment of the term. Thereafter, except for the correction of clerical errors, the court is without power to interfere, and any further action is a nullity. (290, 291)

4. PLEADING—*Waiver.* Application under § 81 of the code to vacate a judgment, presented after the lapse of more than six months from the adjournment of the term. The absence of jurisdiction in the court is not waived, either by a motion to strike off the application, or by a demurrer to the answer of the applicant, filed under leave granted pursuant to his application, nor by answering to the merits after the overruling of the demurrer. (291)

Appeal from La Plata District Court.—Hon. CHARLES A. PIKE, Judge.

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Messrs. RITTER & BUCHANAN and Messrs. HAYT, DAWSON & WRIGHT, for appellant.

Mr. THOMAS B. STUART, Mr. CHARLES A. MURRAY and Mr. CHARLES A. JOHNSON, for appellees.

Mr. JUSTICE HILL delivered the opinion of the court:

This action was instituted upon February 3, 1908, by J. F. and James D. Mowry, copartners, subcontractors, against W. H. Crawford as the original contractor, The Montezuma Valley Irrigation District and The Empire Construction Company as owners, or having an interest in certain canals, reservoirs, etc., and against sundry other persons, who were alleged to be subcontractors, materialmen, etc., under the original contractor, Crawford. The purpose of the suit was to secure a judgment against Crawford for services rendered and materials furnished upon, and used in, the construction of the canal and reservoirs, to have the rights of all parties determined, to have a lien upon these properties, foreclosure accordingly, etc. Numerous subcontractors and alleged lien claimants filed answers and cross complaints. On February 29th, Crawford filed a motion to make the complaint more definite. On March 9th this motion was heard, at which time Crawford was represented by attorneys Wheeler and Weiser. The motion was overruled, and he was given until March 16th to answer. On March 9th The Empire Construction Company filed its answer to the complaint, and answers to the cross complaints of sundry subcontractors. On March 12th the irrigation district filed its answer to the complaint, alleging its ownership of the property; that it was a public corporation, to-wit, an irrigation district, etc., upon account of which its property was not subject to mechanics' liens, etc. On March 16th the defendant Crawford filed his answer and cross complaint, in which he sets forth an alleged cause of action against The Empire Construction Company for work done and

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materials furnished on these properties, etc., his liens, etc. He prayed for judgment against that company for about $30,000, and that it be decreed a lien, for foreclosure, etc. On March 18th the district filed its answer to his, in which, among other things, it set forth its public character account of which its property was not subject to liens, etc. On March 21st The Empire Construction Company filed its answer and cross complaint to the cross complaint of the defendant Crawford, wherein it denied liability to him, and set forth an alleged cause of action against him for damages growing out of his failure to comply with the provisions of his two contracts with it, etc. It prayed for judgment against him for $30,000, etc. Thereafter, the defendant Crawford filed sundry answers to the cross complaints of sundry subcontractors, motions to make more definite, etc. These were thereafter overruled. On April 23rd the defendant Crawford filed his replication to the answer and cross complaint of The Empire Construction Company. Sundry other pleadings and court's orders pertaining thereto followed, among which, upon May 4th, was a motion by the defendant Crawford for a continuance until the next term of court, account of the alleged absence of witnesses, and the inability of his attorneys to be present. This motion upon said date, was overruled, and the court proceeded to trial, which consumed part, if not all, of May 4th, 5th, 6th and 7th, 1908; upon which last date decree was entered, which among other things recites "The defendant, W. H. Crawford, appearing by his attorneys Wheeler and Weiser," also, "Wheeler and Weiser filed a motion for the continuance of this cause for and on behalf of the defendant, W. H. Crawford, which motion was by the court overruled."

The decree sets forth, that Crawford entered upon the construction and completion of the canals and reservoirs in question under two contracts with The Empire Construction Company; that in violation thereof he abandoned the work before completion; that at the time of this abandonment there was due him from the con-

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struction company under these contracts $7,415.02, which money was subject to the liens of the subcontractors; that the property on which the work was done was impressed with the character of public property, and was not subject to liens, in so far as the title of the district was concerned, but that the money owing Crawford by the construction company grew out of, and was derived from, said property and should be held for the payment of the liens; that Crawford violated his contracts, etc., and was not entitled to recover on his cross complaints and should take nothing; that The Empire Construction Company had been damaged in the sum of $10,000 account of Crawford failing to comply with his contracts, and is entitled to have judgment against him for this amount.

The claims of about thirty subcontractors were established in the decree against Crawford, and fixed at certain amounts. Individual judgments against Crawford for these sundry amounts were inserted and decreed to be liens against the moneys in the hands of the construction company found to be owing Crawford. The decree recites that within ten days from its date The Empire Construction Company pay to the clerk the balance found due on the contracts, viz, $7,415.02, on which liens were established, etc., upon its failure so to do that judgment be entered against it for this amount as of the date of the decree; that upon the payment of this sum to the clerk, the construction company be released and discharged from all further liability upon account thereof; that upon receipt of this money the clerk pay, first, the costs of suit, second, all liens established as first-class, third, fifty-three per cent upon all liens established as second-class, and retain the balance subject to the further order of the court; that the amount of said payments be credited upon the judgments against Crawford; that as to defendants, Graham, Morrison and Brimhall, the hearing be continued until the next term. The decree also contains a judgment against Crawford, in favor of the construction company as follows, "That

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the defendant, The Empire Construction Company, have and recover of the defendant W. H. Crawford, the sum of $10,000 for which judgment is hereby rendered and let execution issue therefor."

An appeal appears to have been allowed the defendant Crawford from this decree, amount of bond fixed, and time given for bill of exceptions, but nothing done thereunder. Upon May 17th following, the money found to be due from the construction company to Crawford was paid into court, in compliance with the terms of the decree, and it appears to have been disposed of as ordered without any exception or objection being made thereto.

Upon May 17th, 1909, at a subsequent term of court and over a year after the date of the decree, and more than six months after the adjournment of the term at which it was rendered, the defendant Crawford filed a motion to set it aside, alleging as his reasons that through misfortune and unusual hardships he was unable to be present at the trial, by himself or counsel; that both he and his attorneys were taken by surprise, and that any seeming neglect on the part of either was excusable; that the cause was not properly at issue; that a part of it was left over, and the case not fully determined; that no final judgment had been entered from which the defendant could take an appeal; that the decree was tentative only, and subject to be annulled by further action of the court; that the judgment and decree was void; that the court had no jurisdiction of the subject matter, etc.; that he was unable to apply for relief during the term at which the decree was entered and makes this application at the first opportunity, etc. This motion was supported by the affidavit of the defendant Crawford, which, among other things, states that he was without means when the suit was instituted, but engaged Wheeler and Weiser to appear for him. This is followed by sundry statements pertaining to his finances, and as to why he was not present at the time of the trial; that he was at other points where he had

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secured employment. It also covers his motion for continuance which he says he anticipated would be granted, and the engagements of his counsel at other places which prevented them from being present, etc. It states that he was not advised an appeal had been allowed him, or time given for bill of exceptions, until long after the adjournment of the March 1908 term; that when he received this information he was without means to pay attorneys to go to Montezuma, or make any effort in his behalf pertaining to any suit, that account of which his attorneys withdrew from his employment, etc. The motion is also supported by the affidavit of S. N. Wheeler which states that he is of the firm of Wheeler and Weiser who were of counsel for Crawford, that they filed the motion for continuance, etc. This is followed with their alleged engagement in the preparation for the trial of another cause at another place at the time this case was being tried up to May 7th, upon which last date he states they commenced the trial of said other cause.

The construction company moved to strike this motion from the files. This motion was denied and that portion of the former decree wherein a judgment was entered in favor of the construction company against the defendant Crawford only, was set aside, and Crawford was allowed to file an amended answer and cross complaint against the construction company. The company moved to strike this; this motion was denied. A demurrer was then filed and overruled, an answer with replication and motions followed, thereafter trial was had to the court, which resulted in a judgment in favor of the defendant Crawford against The Empire Construction Company, from which this appeal is taken.

The first question necessary to consider is that of jurisdiction. It is earnestly urged that the original decree was not final; that it was wholly interlocutory and tentative; that a case marshalling liens must of necessity embrace all of them, and declare their status in one decree; that there was no judgment as between Crawford and the construction company, and that part of the

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case was continued. We cannot agree with this line of reasoning when applied to the judgment in favor of the construction company against Crawford. This was the only thing that was set aside. Section 4044, R. S., being section 32 of our lien act of 1899, reads, "The provisions of the Code of Civil Procedure of the State of Colorado, in so far as the same are applicable and not in conflict with the provisions of this act, shall be observed in proceedings to establish and enforce mechanics' liens." Sections 241 and 242 Revised Code read: "241. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves." "242. In an action against several defendants, the court may, in its discretion, render judgment for or against one or more of them, allowing the action to proceed against the others whenever a several judgment is proper." It will be observed that while this action was instituted to secure a personal judgment and enforce a mechanics' lien under the lien act, the court, in its decree held that the property was not subject to liens. The correctness of this ruling has not been challenged, and as the case stood after the rendition of this decree there was no property to be sold, hence, that portion of the lien act pertaining to a foreclosure sale was not applicable. The court found in lieu thereof that there were certain funds which in equity and good conscience the subcontractors were entitled to have applied as credits upon their judgments against the defendant Crawford, and decreed that they be paid into court by the construction company. This was done, and, per the language of the decree, it was then discharged from further liability upon account thereof. This portion of the decree was not set aside and no one has made complaint concerning its being enforced, hence, its validity is not before us for determination.

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In his first answer and cross complaint the defendant Crawford prayed for a judgment against the construction company in excess of $30,000; in its answer and cross complaint thereto the construction company denied liability, and set forth an alleged cause of action against Crawford for damages, account of his failing to comply with his contracts. It prayed judgment for $30,000 against him; he replied thereto, denying his liability, and reiterated his prayer for judgment against the construction company as demanded in his original cross complaint. These matters were at issue at the time Crawford filed his motion for continuance upon May 4th, and judgment was rendered thereon as above set forth in favor of the construction company May 7th, 1908. This judgment was upon a cross complaint against Crawford for damages growing out of a breach of contract between them pertaining to their contractual relation. That portion of section 477 of the Revised Code pertaining to the rules of construction for the Code in referring to the word "judgment" reads, "The word 'judgment' means all final orders, decrees and determinations in an action; also all orders upon which executions may issue." The judgment in favor of the construction company against Crawford was in the usual form; it was neither interlocutory nor tentative; it was rendered upon pleadings initiated by Crawford, and where the causes of action were at issue at the time of the trial, and in a case where the court had jurisdiction of the parties, as well as of the subject matter of the action. Under such circumstances this was a final judgment as between these parties covering the causes of action presented by their pleadings, and from which the defendant Crawford was entitled to an appeal.—*Daniels v. Daniels,* 9 Colo. 133, 10 Pac. 657; *Standley v. Hendrie Manufacturing Co.,* 25 Colo. 376, 55 Pac. 723; *New York Life Ins. Co. v. Brown,* 32 Colo. 365, 76 Pac. 799; *Marean v. Stanley,* 34 Colo. 91, 81 Pac. 759; *Eckman v. Poor,* 38 Colo. 200, 87 Pac. 1088; *Prewitt v. Prewitt,* 52 Colo. 522, 122 Pac. 766; *Archuleta v. Archuleta,* 52 Colo. 601, 123

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Pac. 821; *Forgay v. Conrad,* 6 How. 201, 12 L. Ed. 404; *Klever v. Seawall,* 65 Fed. 373, 12 C. C. A. 58; *Sharon v. Sharon,* 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *Alexander v. Bates,* 127 Ala. 328, 28 South. 415; *Carter v. Caldwell,* 147 Pa. 370, 23 Atl. 575; *Dahlborg v. Wyzanski,* 175 Mass. 34, 58 N. E. 593; *Bunnell v. Berlin Iron Bridge Co.,* 66 Conn. 24, 33 Atl. 533; *Guarantee, etc., Co. v. Philadelphia, etc., Co.,* 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804.

The judgment in favor of the construction company being final, was the court without authority to set it aside at the time it attempted to do so? As a general rule in the absence of statutory authority (jurisdiction and fraud excepted), courts have no control over their judgments after the term at which they are rendered, except to make clerical corrections, etc.—23 Cyc. 902.

Section 81, Revised Code 1908 authorizes a court to relieve a party or his legal representatives from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect, and when for any cause satisfactory to the court, the party aggrieved has been unable to apply for relief during the term at which the judgment was entered, the court may grant the relief upon application, provided the same is made within six months after the adjournment of the term. Outside of this section there is no method provided for reopening a judgment after the expiration of the term, except in case of a motion for a new trial, as provided by section 231 Revised Code. The appellee does not bring himself within the provisions of this latter section, and was only entitled, it at all, to have it set aside under the provisions of section 81, *supra.* It will be observed that he makes no allegation of fraud, and the record upon which he himself relies, disproves his claim pertaining to jurisdiction. In order to be entitled to the benefits of section 81, *supra,* his application must be made within a reasonable time after the entry of the judgment, and in any event not exceeding six months after the adjournment of the term. This he did not do, and after the ex-

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piration of that time, except for the purposes above noted, the court loses jurisdiction, and any other action it may attempt is a nullity.—*Exchange Bank v. Ford,* 7 Colo. 314, 3 Pac. 449; *Clark v. Perry,* 17 Colo. 56, 28 Pac. 329; *People v. District Court,* 33 Colo. 406, 80 Pac. 1065; *Morrell Hardware Co. v. Princess Co.,* 16 Colo. App. 54, 63 Pac. 807; *Newman v. Newton* (C. C.) 14 Fed. 634; *Elder v. Richmond Co.,* 58 Fed. 536, 7 C. C. A. 354.

The contention that the construction company waived this question by making a motion to strike, and also by filing its demurrer to the amended answer and cross complaint of Crawford allowed after its motion to strike his motion to set aside the judgment was overruled, and by answering to the merits after its motion to strike and demurrer were overruled, is not tenable. The question was one of jurisdiction and for this reason was not waived by pleading to the merits.—Section 61, Revised Code, 1908; *Canon City v. Manning,* 43 Colo. 144, 95 Pac. 537, 17 L. R. A. (N. S.) 272; *Diamond Rubber Co. v. Harryman,* 41 Colo. 415, 92 Pac. 922; *Car Coupler Co. v. League,* 25 Colo. 129, 54 Pac. 642.

The motion to vacate not having been filed within six months after the adjournment of the term at which the judgment was rendered, and it not containing any of the matters referred to which permits its consideration thereafter, it came too late. This makes unnecessary any consideration of the merits of the application, had the motion been made in time. The legislature has seen fit to fix a maximum time in which a litigant, under certain conditions, may be relieved from a judgment, beyond this time the courts have no right to act. For which reasons the judgment is reversed and the causes remanded with instructions to grant the motion of the construction company to strike the defendant Crawford's motion to set aside the judgment. All costs thereafter made to be taxed against the defendant Crawford.

Reversed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

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[No. 7457.]

MARTINEZ v. MARTINEZ.

1. APPEAL AND ERROR—*Harmless Error.* The striking from a pleading of matter which may be proven under other allegations is harmless. (297)

2. EVIDENCE—*Competency.* Action to vacate a conveyance of lands, made upon the consideration that the grantee shall support the grantor. Evidence that the grantor executed the deed of her own volition, that her subsequent dissatisfaction was produced by the efforts of other relatives, and evidence tending to show performance by defendant of his promises, is competent, and its exclusion error. (297)

3. PLEADING—*Certainty.* Every litigation should be founded upon some definite theory, and the complaint should state the facts essential to support such theory. (297)

4. ——*Pleading Fraud.* The facts constituting the fraud must be alleged, in order that the court may determine the character of the transaction. A general allegation of fraud is a mere conclusion. (297)

5. SUPPORT—*Deed Upon Consideration Of.* Failure to perform the stipulation for support is sufficient ground to vacate the deed, without any showing of fraud or undue influence in procuring it. (298)

6. ——*Measure of Proof Required.* To vacate a deed duly executed, clear and convincing evidence is required. The facts relied upon must be established beyond reasonable doubt. (298)

7. ATTORNEY—*Undue Influence upon the Court.* In vacating a decree of the County Court it was noticed that the presiding judge of that court was not a person learned in the law; that the plaintiff's attorney was acting as clerk of the court at the time of the preparation of the voluntary deed which was in question, took the plaintiff's acknowledgment thereof, and probably framed it; and that he did not resign his position, until six days before the trial. The court expressed the fear that the attorney may have exercised an undue influence upon the judge. (299)

Appeal from Costilla County Court.—Hon. J. W. MCLELLAN, Judge.

Mr. ALBERT L. MOSES, for appellant.

Mr. F. B. WEBSTER, for appellee.

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Mr. JUSTICE GARRIGUES delivered the opinion of the court:

The object of this suit is to set aside a deed and cancel a contract. Plaintiff below in her complaint alleges that she is old, infirm and wholly unable to read, write, speak or understand the English language, ignorant as to business matters, and unable to understand written instruments; that on October 7, 1908, she owned and possessed a small tract of land upon which she resided with defendant, who was her nephew; that with intent to cheat and defraud her, he wrongfully took advantage of their relationship, and fraudulently persuaded her to execute and deliver to him a quit-claim deed of the premises, reserving therein the following life interest to herself: "Party of the first part hereby reserves a life interest in the property hereby conveyed, also all rents and profits derived from said property, during the term of her natural life"; that no consideration was paid for the conveyance, but defendant promised plaintiff at the time, that if she would deed him the property, he would keep, maintain, clothe, care for, and treat her with kindness and consideration during the remainder of her life; that from the date of making the deed, he has wholly failed, neglected and refused to fulfill his promises, ejected her from the property, treated her cruelly and unjustly, and she has been obliged to support, maintain, and clothe herself, with the aid and assistance of others, and that defendant has contributed nothing whatever thereto.

The second cause of action states that defendant, with intent to cheat, wrong, and defraud her, took advantage of her age, and their relationship, and induced her to enter into an agreement in writing whereby, in consideration of maintenance, she gave him the use of the tract of land, and a span of work horses, during the remainder of her life; that she has kept all the conditions of the contract, but defendant has wholly failed, neglected and refused to keep the conditions on his part

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to be performed, and since the date of its execution, she has been obliged to, and has, with the aid and assistance of others, cared for herself, and he has contributed nothing whatever thereto, wrongfully ousted her from the premises, and continues forcibly to hold possession thereof. She prays to have the deed set aside and the contract cancelled.

The answer admits the execution of the instruments and alleges that the plaintiff resided with, and was cared for by, him and his wife from July 17, 1908, until March 16, 1909, when she voluntarily went away to visit her brother-in-law, Ramon Lucero; that about April 10, 1909, she returned, and took away the span of horses and all her personal effects; that defendant has always been ready and willing to carry out the agreement, and give her a home free with him; that when she deeded the property to him, the premises were not worth over two hundred dollars, to which he added valuable improvements; denies that the deed was unfairly obtained, and alleges that it was first proposed by plaintiff herself, and made without his solicitation. On plaintiff's motion, the following was stricken from the answer:

"That at no time prior to the said 16th day of March, A. D. 1909, had the plaintiff made any complaint about the treatment received by her from the defendant or his wife, and neither the plaintiff nor defendant had contended, nor had there been ground for such contention, that the other had not faithfully kept and performed the terms and conditions set forth and agreed to in the written agreement set out in the third paragraph of the second cause of action in plaintiff's complaint. That after remaining at the home of her brother-in-law, the said Ramon Lucero, for about three weeks the plaintiff for the first time complained that the defendant had not complied with the terms of the said written agreement. * * * That the defendant is informed and believes, and so upon information and belief alleges the fact to be that the plaintiff would never have been or become dissatisfied with the treatment she received from the defendant but for the meddlesome interference of relatives who hoped to become possessed of the land in question,

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and who were chagrined and disappointed when they learned that she had conveyed it to the defendant herein, and would not have brought either the first or second suit against the defendant except at the instigation of these same persons. * * * and that she was well and fully advised of her rights, and the effect of making the said deed, by a regularly licensed attorney at law who has had many years practice at the bar, and was, at the time of making the said deed, deputy County Clerk of the county of Costilla, and is at this time her attorney in this case: And that in addition to the counsel and advice of the said lawyer, she had the counsel, advice and assistance of Honorable J. M. Olguin, county treasurer of Costilla county, who speaks both his native language, and the native language of the plaintiff, Spanish or Mexican, and English fluently, and reads and writes both languages with ease and accuracy."

2. There is some conflict in the evidence, but we think its preponderance fairly shows that plaintiff, who was over sixty years of age, prior to July 17, 1908, lived alone on a small farm which she owned. In June of that year, while defendant was working in Wyoming, plaintiff inquired about him of her cousin Abundo Martinez, saying she was waiting for him to return; that she wanted to deed him the place, and make him her heir, the same as though he were her son. July 17, defendant and his wife moved into the house of plaintiff at her request, where they lived together as one family until March 16, 1909, defendant's wife doing the cooking. It appears a cloud burst had almost destroyed the farm, by washing away the soil, and defendant spent several months in making repairs. October 7, 1908, they all went to town, and while there, plaintiff executed the instruments which were previously prepared for her, at her request, and under her instructions. While in town, she went with defendant to the store of Gallegos, to whom she explained the whole transaction, and defendant at that time arranged with the merchant to allow her to have whatever she wanted, and charge it to him, and under this arrangement she procured what articles

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she desired that day. The parties continued to live together with no particular trouble until about Christmas, when plaintiff gave one of the horses to Antonio Vigil, who took it away. Defendant went after, and recovered this horse from Vigil, under his claim of right to its use, and this caused some trouble, which, however, was afterwards adjusted. On the 10th of March, 1909, plaintiff went to visit her sister Mrs. Lucero, and soon after authorized Ramon to sell the place she had deeded the defendant, which he attempted to do. April 10th, she returned to the farm, and took away both horses and all her personal effects, and April 27th began suit to cancel the deed and contract. Defendant visited her at her sister's and tried to persuade her to return, but she refused. It seems the sister and her husband knew nothing of the conveyance until this visit, and when they learned of it, defendant says they caused her to be dissatisfied and persuaded her to bring the suit.

The court rejected proof of the following matter: that plaintiff voluntarily, without defendant went to J. M. Olguin and W. H. Meyer, consulted with them about the transaction, and procured their assistance in preparing the papers; that she talked with her countrymen who were capable of giving her advice, and that she thoroughly understood what she was doing; that the sister complained to and scolded her for deeding the property to the defendant; that no complaint had ever been made prior to the visit to the sister, and that defendant from July 17, 1908, to March 19, 1909, bought provisions, groceries and merchandise for the use of the family of which plaintiff was a member.

The court found that the instruments were procured through and by the fraud of the defendant; that he had contributed nothing whatever toward the support of plaintiff; but on the contrary that he and his wife had been supported by her, whom they used as a menial, and entered an order setting aside the deed and cancelling the contract.

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3. In this case, the court might well have overruled the motion to strike portions of the answer. It would have done no harm; but inasmuch as the defendant, upon the issues as they were formed, eliminating the stricken matter, could properly have introduced evidence covering these matters after the motion to strike was sustained, the error, if any, was harmless.

4. The excluded evidence tended to show that defendant bought the provisions used in the family; that plaintiff made the deed of her own volition, and that her sister and brother-in-law brought about the dissatisfaction. We think this evidence was competent, and are not prepared to say it was harmless error to reject it. *Wilson v. Morris,* 4 Colo App. 242, 36 Pac. 248.

5. The evidence did not warrant the finding that defendant procured the instrument through fraud. Fraud was neither alleged nor attempted to be proved. A person commencing litigation should base it upon some definite theory, the pleadings should state the essential facts to support that theory, and the evidence should correspond to the pleadings. It is not sufficient to say that a deed or contract was procured by or through fraud, or that the defendant acted fraudulently, for this would be only a conclusion. The facts constituting the fraud must be pleaded in order that the court may determine whether the act was fraudulent.—*Thomas v. Mackey,* 3 Colo. 390; *Bennett v. Reef,* 16 Colo. 431, 27 Pac. 252; *Kindel v. Le Bert,* 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234; 18 Enc. Pl. & Pr. 804; Bliss on Code Pleading (2nd Ed.) § 211. But we do not think it necessary in this case that fraud be either alleged or proven. While the complaint contains two causes of action, one based on the deed and the other on the contract, we are inclined to treat it as based upon one transaction, and the pleading as stating one cause of action. Considered in this light the complaint sufficiently alleges a conveyance of the land to defendant, reserving a life interest to plaintiff, in consideration for a promise to support her, which promise defendant

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failed to keep. While it is true that contracts of this character usually contain a provision that a failure to perform the acts promised should invalidate the instrument, and entitle the grantor to a reconveyance, we do not regard the omission of such a clause as fatal to the action. In this class of cases there is a line of authorities which hold that where an aged person conveys all his property to another in consideration for a promise by the grantee to support the grantor for life, that if the grantee fails to keep the promise or perform the agreement, a court of equity will grant relief by rescinding the contract, setting aside the deed and ordering a reconveyance of the property without the necessity of alleging or proving fraud. Under the circumstances of such a case, a failure to perform the stipulation for support is a sufficient ground for setting aside the deed without any showing of fraud.—24 Am. & Eng. Enc. of Law (2 Ed.), 620. It is well settled that courts should be very guarded in setting aside duly executed instruments, by requiring clear and convincing proof of the facts upon which they are sought to be avoided. This does not mean proof to a certainty, but a mere preponderance of the evidence is not sufficient. The facts must be established beyond a reasonable doubt.—*Wilson v. Morris,* 4 Colo. App. 242, 36 Pac. 248.

In *White v. Johnson,* 4 Wash. 114, 29 Pac. 932, it is said:

"This case presents anew the old story of trouble arising from this character of contracts; and while courts of equity should be quick to respond to the appeals of the old, the infirm and the incompetent for protection against the wiles of designing men who seek by overreaching methods to profit and thrive at the expense of waning intellects and confiding old age, yet the investigation of such cases must be conducted with extreme caution."

The testimony in this case discloses that the agreement was made in perfect good faith. There is nothing in the evidence which raises a presumption or inference that the promise was made with no intention at the time,

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of performing it, and the pleadings contain no such averment. The case is based upon the theory of a failure to keep the promise of maintenance, and the doctrine is confined to cases of this character.

We feel satisfied that the court below was not guided by that principle of equitable jurisprudence which requires that the proof shall be clear and convincing before setting aside or defeating a duly executed instrument.—*Butsch v. Smith,* 40 Colo. 64, 90 Pac. 61. Keeping in view the fact that there may be a retrial of the case, we do not wish to comment on the evidence further than to say that it did not come up to the standard and requirement of being made out beyond a reasonable doubt.

In closing, it seems appropriate to state that the county judge who tried the case was a layman, and not an attorney learned in the law; that the attorney who brought and tried the case for plaintiff was the clerk of his court, took plaintiff's acknowledgment to these instruments, and probably drew them; that he did not resign his position as clerk until six days before the trial. Under these circumstances, we fear he may have exercised an undue influence over the court. The judgment is reversed, and the cause remanded.

Reversed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT concur.

[No. 7550.]

BLANKE TEA & COFFEE COMPANY v. SARGENT ET AL. AND THE UNION TRADING COMPANY, INTERVENOR.

1. FRAUDULENT CONVEYANCES—*Intent.* A merchant's transfer of his stock of merchandise to a trustee, for its full value, and in good faith, for the protection of all his creditors, is unassailable. Such a sale is not within Rev. Stat. § 2678. (301)

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2. ——*Bulk Sale.* The transfer of the stock of a merchant, not in the ordinary course of trade, is only *prima facie* evidence of a fraudulent purpose. (301)

Error to Mesa County Court.—Hon. WALTER S. SULLIVAN, Judge.

Messrs. MCMULLIN & STERNBERG, Mr. ELMER L. BROCK and Messrs. SMITH & BROCK, for plaintiff in error.

Messrs. ADAMS & GAST, for defendants in error. Mr. GEO. L. NYE, *Amicus Curiae.*

Mr. JUSTICE SCOTT delivered the opinion of the court:

D. W. Sargent and son, defendants in error, conducted a small mercantile business in the town of Fruita; the firm became indebted to various persons including the plaintiff in error. It made an arrangement with the Union Trading Company to sell its stock of merchandise to the latter. The parties went to the cashier of a bank in Fruita to have the papers drawn. He advised against the sale to the trading company, and suggested that the stock be transferred to one Abel, as trustee for the benefit of all the creditors of Sargent & Son. This was done, and under the authority of the deed of assignment Abel sold the stock of goods to the trading company. The price agreed upon and paid by the Union Trading Company, was the same as Sargent and son had previously fixed as the price the firm was to receive in case of the sale direct to that company.

It is not questioned but that this price was a full and fair value of the goods sold. After the transfer of the stock to the trading company, the plaintiff in error, a creditor of Sargent & Son, brought suit in attachment before a Justice of the Peace, and levied upon the stock of goods as the property of Sargent & Son.

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Upon appeal to the County Court the attachment was dissolved, and the stock of goods found to be the property of the Union Trading Company. There was clearly no statutory ground upon which the attachment could be sustained. The court made the following, among other, findings of fact:

"The transaction as to all parties, the defendants, Sargent & Son, Abel the trustee, and the Union Trading Company was free and clear of any actual fraud on the part of any one, and was made with the intention upon the part of all, of securing the best results for creditors. After the trading company had taken possession of the goods they were seized under an attachment writ issued by the Justice of the Peace in this action."

The evidence justifies this finding and it will not be disturbed. It is clear from the record that the execution of the trust to Abel was for the good faith purpose alone, of protecting all the creditors. There is nothing in the record to show that these were not all protected or that the amount received by the trustee was not sufficient for such purpose. Nor does it appear that the partnership was insolvent.

The contention of the plaintiff in error is that the transaction was in violation of § 2678 Rev. Stat. 1908, commonly known as the Bulk Sales law.

Counsel have presented extensive arguments and numerous citations of authority relating to this statute, and those from other states, of similar import.

But under the circumstances of this case there was no such sale as is contemplated by that statute, and hence the statute is not involved, and it can serve no good purpose to discuss it. But in any event that statute provides that in case of a sale in violation of its provisions, such fact shall be simply *prima facie* evidence that the sale was fraudulent, and the trial court found upon that question and held that the burden was upon defendant, and in this case that "The defendants assumed this burden of proof and succeeded in showing that this sale was free and clear of any fraudulent intention, and was made in the full belief that it was for

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the benefit of creditors, and was made with the intention of satisfying the claims of the creditors so far as the proceeds would go."

Judgment affirmed.

En banc.

[No. 7570.]

KERN RESERVOIR & DITCH COMPANY v. WELDON VALLEY DITCH COMPANY ET AL.

WATER RIGHTS—*Unlawful Diversion and Storage.* The diversion and storage by an irrigating company of water to the use of which another is entitled, or the retention of it, after it is wrongfully impounded by another, will be relieved against in equity. (303)

Error to Morgan District Court.—Hon. H. P. BURKE, Judge.

Mr. H. N. HAYNES, for plaintiff in error.

MESSRS. STEPHENSON & STEPHENSON and MESSRS. ALLEN & WEBSTER, for defendant in error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

While numerous questions are urged by plaintiff in error in support of its contention that the decree rendered by the trial court is wrong and should be reversed, the real question involved, is whether it wrongfully and illegally stored water in its reservoir to the injury of the defendants in error. The District Court so found in an action brought by defendants in error as plaintiffs, against plaintiff in error as defendant, the object

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of which was to compel defendant to return water alleged to have been wrongfully impounded by it, to the Cache la Poudre river to supply the priorities of plaintiff's and from a decree granting this relief and restraining it from such wrongful acts in the future, the defendant has brought the case here for review on error.

The testimony establishes that plaintiff in error either diverted and stored water in its reservoir, without right, or retained it therein after it had been wrongfully impounded by another, at a time when it should have been permitted to flow down the stream from which it was diverted to supply the priorities of plaintiffs, and was required for that purpose. Based on these facts the decree of the court is unquestionably right, and is therefore affirmed.

Judgment affirmed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 7555.]

WILLSON v. THE COLORADO & SOUTHERN RAILWAY COMPANY ET AL.

1. PLEADINGS—*Reply.* A reply which directs itself only to "all new matter in said answer contained", is vulnerable to a motion to make more specific; but if not so assailed it suffices to put in issue the affirmative averments of the answer. (313)

2. RAILROAD COMPANY—*Liable for Negligence of Lessee.* A railroad company which admits another to the joint use of its tracks is liable for the negligence of the one to which such permission is extended, in the operation of its trains thereon. (313, 314)

3. RECEIVER—*Negligence Not Chargeable to the Property Owner.* In the absence of a statute to the contrary a railway company is not liable for the negligence of a receiver in charge of its property. (314)

4. ——*Purchaser of Railroad Liable for Receiver's Negligence.* Mortgage Foreclosure Sale of a Railroad, the purchaser taking "subject

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to the liabilities of a receiver incurred in operating" the mortgaged properties, is liable for the negligence of the receiver in permitting a car containing dynamite to be unnecessarily retained upon the tracks, in the vicinity of private dwellings; in failing to in any way advise the public of the explosives, even after a fire had broken out in such proximity thereto that an explosion might reasonably be anticipated; and in failing to remove the car, while, after the fire had broken out, such removal was practicable; and this, even though the liability of the receiver has never been judicially established. (315, 318)

5. NEGLIGENCE—*Common Carrier Transporting Explosives.* A common carrier may lawfully carry dynamite and like explosives, but may not expose persons to danger from an explosion, where this is not necessary for the proper performance of his duty as a carrier. A car containing dynamite, and loaded with other merchandise in such manner that the dynamite could not be removed without unloading the car, was unnecessarily left standing upon the tracks of a railway in the vicinity of occupied dwellings. It was not placarded with notice of its dangerous contents. A fire breaking out in the vicinity, those engaged in attempting to extinguish it were not warned of the presence of the explosives, nor was any attempt made to remove the car, though a half hour intervened before any explosion occurred. *Held* the receiver in charge of the railway might by the jury be declared negligent. (316)

6. —*Pleading.* The negligent leaving of a railway car containing high explosives in large quantities where human life may be endangered, is a nuisance. In an action for the death of one who, without fault on his part, was killed by the explosion of the contents of the car, it is not necessary to allege or prove the immediate cause of the explosion. (318)

7. ——*Negligence of Defendant Concurring with Wrongful Act of a Stranger.* Where injury occurs by the negligence of the receiver of a railway, and the wrongful act of another, for whose conduct neither the receiver nor the injured person is liable, the receiver is chargeable if the injury would not have occurred but for his negligence. (318)

8. EVIDENCE—*Competency.* Action for negligence in unnecessarily detaining at a railway station a car containing dynamite, consigned to another station; in not placarding the car with notice of its contents; not attempting to remove it after a fire had broken out in the vicinity; and in not notifying those engaged in attempting to suppress the fire of the dangerous contents of the car. An ordinance of the city regulating the storage of explosives is not admissible. (317)

9. PARTIES—*Defendants—Joint Torts.* Certain railway tracks of the Colorado & Southern Company were operated jointly by that company and the receiver of the Colorado & Northwestern Company. By the negligence of the receiver plaintiff's intestate came to his death.

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The title of the Colorado & Northwestern Company was afterwards purchased by the D. B. & W. Co. at a sale made pursuant to the decree in a foreclosure suit in which the receiver was appointed, "subject to the liabilities of the receiver incurred in operating" etc. *Held* that the Colorado & Southern Company having admitted the receiver to a joint occupation of the tracks, with itself, it was liable for his neglect; that the D. B. & W. Co. was liable, by the terms of its purchase; that each being liable for the same event, they were properly united, and there was no misjoinder either of parties or causes of action. (318)

10. ——*Non-Suit as to One Defendant—Effect.* Several joined as defendants in an action for a tort. Non-suit as to one does not determine the cause as to the others. (319)

Error to Boulder District Court.—Hon. JAMES E. GARRIGUES, Judge.

Mr. F. G. FOLSOM and Mr. H. E. ROWLAND, for plaintiff in error.

Mr. E. E. WHITTED, Mr. R. H. WIDDICOMBE and Mr. J. M. CATES, for defendants in error.

July 28th, 1909, plaintiff in error brought an action against defendants in error to recover damages for the death of her husband, which occurred in the City of Boulder August 10th, 1907. For convenience the Colorado and Southern Railway Company will be referred to as the C. & S., the Colorado and Northwestern Railroad Company as the C. & N., and the Denver, Boulder and Western Railroad Company as the D. B. & W.

The complaint charged that the C. & S. and the C. & N., through its receiver, owned and operated certain railroad tracks in the City of Boulder on or about August 8th, 1907; that on March 29, 1909, the property of the C. & N. was sold under foreclosure proceedings and was thereafter conveyed to the D. B. & W. subject to the liabilities of the receiver incurred in operating the mortgaged property, and that on the 13th day of July following the receiver was discharged; that the C. & S. and C. & N. used the same tracks, freight yards and

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freight stations at Boulder by virtue of a lease from the C. & S. to the C. N., whereby the former leased to the latter terminal facilities in the City of Boulder under which the C. & S. handled all the business of the two roads at that point. It then alleged that about March 4th, 1889, the City of Boulder passed an ordinance which provided in substance that no person should keep, at any one time, gun, blasting, or giant powder, dynamite, or other explosives of similar nature, at his place of business or elsewhere in the City of Boulder, in a greater quantity than 100 pounds, and that when exceeding one pound in quantity, should be kept in closed receptacles, each of which should contain not more than fifty pounds, and kept at a safe distance from fires, and in a situation from which it could be easily removed in case of fire, and that such explosives when kept in quantities exceeding ten pounds at places of business, should be contained in magazines placed upon trucks with handles, so that the same could be easily moved, and that when such places were closed at night such magazines should be placed near the front entrance, so as to be readily moved in case of fire. It was further alleged that on August 8, 1907, there existed an agreement between the City and the C. & S. and C. & N., under which these companies agreed to keep all explosives in course of transportation at a place on a side track west of 4th street; that sometime prior to this date a shipment of dynamite came into the freight yards of these companies, out of which 2,000 pounds, packed in forty separate boxes, consigned to the Boulder County Mine at Cardinal, were transferred, with their knowledge, and under the supervision of their employes into a car belonging to the C. & N., standing on a side track at 10th and Water streets, in the freight yards of these railroad companies; that this track was located near a freight shed; that the platforms about this shed were saturated with oil; that a large shipment of oil was on the platform; that there were accumulations of waste paper and other inflammable material about the station and platform, which were in danger

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of being ignited by sparks from locomotives;—all of which was known to these defendants; that four other cars were run in on the side track in such manner that the car in which the dynamite was stored could not be removed without removing these cars; that the dynamite was placed in the end farthest removed from the door of the car, and the car filled with other merchandise in such manner that the dynamite could not be removed without unloading the other articles; that the car containing the dynamite was not placarded with any sign giving notice that it contained an explosive, and was left standing on the side track from the time it was loaded until it was destroyed by fire on the morning of August 10, 1907; that there was a strike of the employes of the C. & S. at the time; that these employes were threatening violence to the railroad property; that this was known to the C. & S. and C. & N. companies; that a watchman was not provided, and that the dynamite was loaded for transportation in time to have been transported by a freight train which left the afternoon of August 8th for Cardinal, but that the car containing it was permitted to remain where loaded, until destroyed by fire the second day thereafter. It was then alleged that fire broke out in the freight yards on August 10th; that no warning was given by either the C. & S. or C. & N. that the car was loaded with dynamite, and no attempt was made to remove it from the vicinity of the fire, or protect the firemen, or people congregating near the fire, from the danger of an explosion; that the chief of the fire department called for volunteers to aid in extinguishing the fire, and that the husband of plaintiff was near the car, engaged as a volunteer in attempting to extinguish it; that he was conducting himself in a reasonably prudent manner, and was ignorant of the fact that the car contained dynamite; that the fire was communicated to the car, causing an explosion which so injured the husband of plaintiff that he died the next day. A general demurrer to this complaint was filed by each of the defendants, and overruled.

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The C. & N. answered in substance that its property was in the hands of a receiver who had exclusive charge of it at the time the powder was placed in the car, and at the time of the explosion, and put in issue all the allegations of the complaint.

The C. & S. company answered by pleading section two of the ordinance set out in the plaintiff's complaint, which provided that:

> "No persons shall carry any such powder or other explosive on any vehicle in any part of the city, unless the same shall be secured in kegs, boxes or canisters, sufficiently close to prevent the grains thereof from falling out."

It admitted that the shipment of dynamite was brought into the freight yards at Boulder on August 8, 1907, but not by it, and that certain packages were transferred to a car belonging to the C. & N. standing on the track belonging to the C. & S., near 10th and Water streets, but denied that such transfer was made under the supervision of its agents. It admitted the location of the car with reference to the freight shed and platform; that it used this shed and platform; that the side track was close thereto;—but denied that such shed and platform were saturated with oil, or that there was any accumulation of waste paper or other combustible material on or about the platform. It further admitted the car could not be removed without moving other cars upon the same track, but alleged that these cars were not placed on the track by it, or any of its agents. It also admitted that at the time of the explosion some of its employes were on a strike, but denied that they were threatening violence or destruction of its property, and admitted a fire broke out on the morning of August 10th, and that this fire caused the powder to explode. All the other allegations of the complaint were put in issue by the answer. For second answer it pleaded that the fire which caused the explosion was started by the malicious and criminal act of incendiaries, who set fire to cars near the freight station, and that this fire was communicated to the car in which the powder was stored.

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The D. B. & W. answered that it purchased the property of the C. & N. in the month of March, 1909, and pleaded provisions of the decree of sale under which it purchased the property, from which it appears that it assumed the liabilities of the receiver, substantially as stated in plaintiff's complaint, and alleged that at no time prior or subsequent to the decree of foreclosure, had any liability against the receiver of the C. & N. been adjudged or decreed in any court, concerning any matter set forth in the plaintiff's complaint. For second defense it pleaded that there was no allegation in the complaint that any negligent act on the part of the receiver caused or contributed to the explosion. For third defense it pleaded in substance the same as set forth in the second defense of the C. & S.

The plaintiff filed a replication to the answer of the C. & N. denying,

> "Each and every allegation of new matter in said answer contained."

By way of replication to the answer of the C. & S. she denied,

> "Each and every allegation of new matter in said answer contained, except such matters as are hereinafter specifically admitted."

The admission related to section two of the ordinance pleaded in the answer. The replication to the answer of the D. B. & W. was similar, and, with the exception of denying the affirmative defenses, admitted the other averments of the answer and alleged that the deed conveying the property to the D. B. & W. contained the provisions pleaded in her complaint.

At the trial the defendant companies objected to the introduction of any evidence, and moved the court to dismiss the case, because the complaint did not state facts sufficient to constitute a cause of action; that the action is in tort against defendants jointly, while the allegations are both joint and several; because the origin of the fire is not alleged in the complaint; that no joint action can be sustained against defendants on the sep-

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arate and independent acts of negligence alleged; and, for the reason, that if the defendants are liable at all, they are severally and not jointly liable. This motion was overruled.

Plaintiff offered in evidence the ordinance pleaded, —which was refused. The testimony introduced on her behalf in chief established that a car of dynamite was hauled into Boulder by the U. P. company on the morning of the 8th of August, 1907. The powder was consigned to a Boulder merchant who placed forty cases, of fifty pounds each, in a car belonging to the C. & N. These cases were consigned to a party at Cardinal, a station on the C. & N. The C. & N. is a narrow gauge and the C. & S. at Boulder a standard gauge. The C. & N. extends in a westerly direction from Boulder and the track upon which the car of the C. & N. stood belonged to the C. & S., a third rail having been placed by the latter upon which to run narrow gauge cars, under a traffic arrangement between the companies which was for their mutual benefit in transporting passengers and freight between Denver and Boulder and points beyond in the mountains to the west, on the line of the C. & N. By this agreement the C. & N. were to pay the C. & S. $75.00 per month for the use of its track and station at Boulder. The receiver adopted this contract under authority of the court appointing him. The use of these tracks was not exclusive by either but, on the contrary, it appears that they were used jointly as the transaction of business might require. The C. & S. and the receiver of the C. & N. had a joint agent who had general charge of the business of both at Boulder. The employes of the C. & S. handled the freight for both roads. The foreman of the freight yard was an employe of the C. & S. He had control of the disposition of freight cars in and around the station. Shortly after the powder had been placed in the car a freight train departed for Cardinal, but the merchandise car of that train was full, and the car containing the powder was left standing on the track, in order to load it with other

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merchandise. The train over the C. & N. next day carried passenger coaches and for this reason the car in which the powder was loaded was not attached. The car was under the control of the employes of the C. & S. who assisted in placing other merchandise in it. The powder was so placed in the car in connection with other merchandise that the latter articles would have to be removed before the powder could be reached. In the immediate vicinity of where the car stood a number of residences are located, in fact, it appears to be quite a thickly populated part of the city. The car containing the powder was not placarded or marked in any manner, to indicate that it contained an explosive. About midnight of August 9th or shortly thereafter on August 10th, fire originated in the freight yard, which was communicated to the car containing the powder,—and caused the explosion. The fire department of Boulder at that time was endeavoring to extinguish the fire. No warning was given that the car contained powder, although the fire had been burning fully half an hour before the explosion occurred; neither was any effort made to remove the car. Plaintiff's husband was assisting the department, and was killed by the explosion. At the time the powder was loaded on the car, and also at the time of the fire, the C. & N. was in the hands of a receiver, who was subsequently discharged by order of the court appointing him, and prior to the time the suit was brought by plaintiff. The property of the C. & N. was sold, by order of court appointing the receiver, to the D. B. & W. Under the deed conveying the property the vendee assumed all the liabilities of the receiver incurred in his capacity as such, while in control of the C. & N. property.

At the close of the testimony on behalf of plaintiff, in chief, the defendants moved the court for judgment of non-suit,—which was sustained as to the C. & S. and C. & N. and overruled as to the D. B. & W. Testimony was then introduced on behalf of the D. B. & W. which established that the fire was started in the freight yard

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by incendiaries. At the close of all the testimony the D. B. & W. moved that the jury be instructed to return a verdict for the defendant, based upon the ground that the fire was caused by the acts of incendiaries, for which it was not responsible; that the fire was not the result of its negligence; that no negligence which was the proximate cause of the explosion had been shown by the evidence; that it appeared the fire was brought about by independent intervening human agencies, against which acts the defendant could not be held responsible; that the action is joint against three defendants and the evidence shows, if it shows negligence at all, that the negligent acts were separate and distinct, and in no wise connected with each other and that the evidence failed to sustain the allegations of the complaint of a joint tort. This motion was granted and a verdict rendered and judgment accordingly.

The assignments of error on behalf of plaintiff are substantially embraced in the propositions urged upon our attention, that the court erred in refusing to admit in evidence the ordinance regarding explosives, in granting the motion of the C. & S. and C. & N. for nonsuit, and in directing a verdict in favor of the D. B. & W.

As cross-errors the defendants assign the following: (1) That the court erred in its refusal to sustain the demurrers to the complaint, based upon its failure to state a cause of action and upon the ground of misjoinder of parties. (2) That the court erred in its refusal to direct a judgment for defendants on the pleadings, and its refusal to sustain their motion to dismiss the case.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The motion of the C. & S. and D. B. & W. for judgment on the pleadings, or more properly speaking, as the record shows, for judgment by default for want of a reply, was based upon the ground that the respective replications of plaintiff, to the effect that all new mat-

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ter in the answers of these defendants was denied, did not put in issue the affirmative defenses so pleaded. Such a denial is poor pleading and vulnerable to a motion to make more specific,—but as the replications were not so assailed they were sufficient to put in issue the affirmative averments of the respective answers to which they were directed.—*Highlands v. Raine,* 23 Colo. 295, 47 Pac. 283; *City of Crete v. Hendricks,* 2 Neb. Vnof. 847, 90 N. W. 215.

The remaining errors assigned by defendants raise the questions of the sufficiency of the complaint and misjoinder of parties. To some extent at least these questions are involved in those urged by plaintiff, and we will next consider the rulings of the court in sustaining the motions for non-suit as to the C. & S. and C. & N. and directing the verdict in favor of the D. B. & W.

The C. & S. and C. & N. had an arrangement whereby the latter was permitted to use the tracks and station of the former in Boulder. The powder had been placed in a car of the C. & N. and whether the motion for non-suit interposed on behalf of the C. & S. was properly sustained depends upon whether it was liable for the alleged negligence of the receiver of the C. & N. who, under the direction of the court appointing him, adopted this arrangement or contract. The contract was one for the joint use of the road-bed, track and station at the point where the explosion occurred. This property belonged to the C. & S. The companies had a joint agent at Boulder. He had charge of the men who handled the freight at the depot for both roads. The C. & S. employes handled the freight for the C. & N., and the foreman of the yards, who was an employe of the C. & S., had control of the disposition of the cars in and around the station;—so that it appears the C. & S. controlled the tracks and station at the yards and that the C. & N. used these tracks jointly with the C. & S. with its consent, for which, and the handling of freight, it paid the C. & S. company a monthly rental. A railroad company which permits another to make a joint

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use of its track is liable for the negligence of the company to which the permission is granted.—*St. Louis I. M. & S. Ry. Co. v. Chappell,* 83 Ark. 94, 102 S. W. 893, 10 L. R. A. (N. S.) 1175; *R. R. Co. v. Barron,* 5 Wall. 90, 18 L. Ed. 591; *Sanders v. Penn. R. Co.,* 225 Pa. 105, 73 Atl. 1010, 133 Am. St. Rep. 857; *O'Bannion's Adm'r v. So. Ry. Co.* (Ky.) 110 S. W. 329; *Penn. R. Co. v. Ellett,* 132 Ill. 654, 4 N. E. 559; *C. & E. R. Co. v. Meech,* 163 Ill. 305, 45 N. E. 290; *Central Ry. Co. v. Wood,* 129 Ala. 483, 29 South. 775.

We think the authorities are substantially unanimous on this proposition; the reason for the rule being that a railroad company owes the public certain duties and that it can not by its own act, without the consent of the legislature, absolve itself from its public obligations. It is true that in this state a railroad company is authorized to lease its property to another company under certain circumstances and if the arrangement or contract in question had given the receiver of the C. & N. the exclusive control and possession of the tracks and station where the explosion occurred, it is possible that the C. & S. would not be liable for the tortious or negligent act of the receiver,—but that is not this case.

The C. & N. at the time the powder was loaded in the car, and at the time of the explosion, was in the hands of a receiver who had the exclusive control of its property and the operation of the road. The receiver's possession was not the possession of the corporation; the latter could not control either the receiver or his employes. The receiver was not the agent of the C. & N., and although it owned, or had some interest in, the property of which he had charge, it had no voice in its management, and could not select or control the employes who operated its road, or the property which it had leased from the C. & S., consequently in the absence of a statute imposing liability, it is not responsible for the torts of the receiver or his employes.—*Kansas Pac. Ry Co. v. Searle,* 11 Colo. 1, 16 Pac. 328; *Ohio & M. R. Co.*

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v. Davis, 23 Ind. 553, 85 Am. Dec. 477; *Chamberlain v. New York, L. E. & W. R. Co.* (C. C.) 71 Fed. 636; *Memphis & C. R. Co. v. Hoechmer,* 67 Fed. 456, 14 C. C. A. 469; *Schurr v. Omaha & St. L. Ry. Co.,* 98 Iowa, 418 67 N. W. 280; *Gableman v. Peoria, D. & E. Ry. Co.* (C. C.) 82 Fed. 790; *State v. Wabash Ry. Co.,* 115 Ind. 466, 17 N. E. 909, 1 L. R. A. 179; High on Receivers (4th Ed.) § 396; *Godfrey v. Ohio & M. Ry. Co.,* 116 Ind. 30, 18 N. E. 61; *Archambeau v. New York & N. E. R. Co.,* 170 Mass. 272, 49 N. E. 435. There are some exceptions to this rule but the facts here do not bring the cause within the exceptions. From the averments of the complaint it appears that the negligence charged, for which it sought to hold the C. & N. responsible, was the acts of the receiver and, for the reasons above given, its demurrer challenging the sufficiency of the complaint should have been sustained.

In considering the ruling of the court in directing a verdict for the D. B. & W. three questions are presented: (1) The sufficiency of the testimony to establish negligence of the receiver. (2) Whether the fire, started by incendiaries, was the proximate cause of the death of plaintiff's husband, and, (3) If not, can the D. B. & W. be held for the negligence of the receiver in this action?

The evidence establishes that the car containing the powder was loaded with other merchandise and left standing at the freight station, which was located in the near vicinity of many occupied dwellings; that the car was not placarded with notice of its dangerous contents; that those engaged in endeavoring to extinguish the fire were not warned that the car contained an explosive, although the fire had been burning for fully one-half hour before the explosion occurred. Neither was any effort made to remove the car. It also appears that the powder was loaded in ample time for the car containing it to have been taken out on the train which left on the afternoon of August 8th, but was held on the track in order that enough freight might be accumulated

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to fill the car. Does this state of facts, tend to establish negligence? The keeping of explosives in large quantities in close proximity to occupied dwellings is a menace to life, and whether keeping it in a car in which it is loaded for transportation by a common carrier constitutes actionable negligence must depend more or less upon the facts of each case where such action is called in question. The law considers explosives dangerous and requires that those engaged in transporting them should exercise that degree of care to prevent injuries to others therefrom as ordinarily prudent persons, considering their dangerous character, would exercise in similar circumstances, and a failure to do so is negligence.—*Derry Coal and Coke Co. v. Kerbaugh,* 222 Pa. 448, 71 Atl. 915; *Henry v. Cleveland C. C. & St. L. R. Co.,* (C. C.) 67 Fed. 426. A common carrier has the right to transport powder, but this does not include the right to subject persons to danger from its explosion in a greater degree than is reasonably necessary for the proper performance of its duty as a carrier.—*Ft. Worth and Denver City R. Co. v. Beauchamp,* 58 L. R. A. 716. Applying these principles we think there was sufficient testimony to justify the submission of the question of negligence to the jury. The car was left in the near vicinity of occupied dwellings. There is no doubt regarding the dangerous character of dynamite. The car containing it could have been sent out before it was entirely filled with other merchandise. If fire was communicated to the powder it was liable to explode. It was in sufficient quantity to cause the death of persons near by if it exploded. After the car was filled with merchandise and ready for shipment it was still left where, if the powder it contained exploded, it might cause the loss of human life. It was not placarded so as to give notice to any one of its dangerous contents. The fire had been under headway for a considerable period of time, and yet no employe of the receiver notified those engaged in extinguishing the fire that the car contained powder; nor made any effort to remove it. Un-

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doubtedly the car, after being loaded, could have been moved to some point where danger from fire would not have been so great as where it stood, or in case fire was communicated to it and an explosion occurred, it would not likely have caused the death of any person. We think all these matters were proper for a jury to consider in determining whether negligence was established, and not a question for the court.

In this connection we will consider the ruling of the court in declining to admit in evidence the ordinance of the City of Boulder as pleaded in the complaint. No doubt a common carrier may be guilty of negligence by violating this ordinance, but in the circumstances of this case we think it was not admissible. The receiver was engaged in transporting the powder. It was loaded into a car for that purpose, and the negligence, if any, consisted not in storing it, but in the failure to take that degree of care, after it was placed in the car, to prevent injury to others which an ordinarily prudent person, taking into consideration its dangerous character, would exercise under similar circumstances. Nor was the section of the ordinance pleaded by defendants admissible. They were not charged with negligence as a result of failing to comply with its provisions.

If a jury should determine that the receiver was guilty of negligence, would the fact that the fire was started by an incendiary excuse such negligence? Where there are several agencies or causes of an injury the question is which was the efficient, dominating cause and in determining this question the rule is, if the jury should find the receiver was guilty of negligence, that where the injury is the result of the combined negligence of a defendant, and the wrongful act of a third party for whose act neither the injured party nor the defendant is responsible the latter is liable when the injury would not have occurred except for his negligence.—*Colo. Mort. & Inv. Co. v. Rees,* 21 Colo. 435, 42 Pac. 42; *Carlock v. D. & R. G. Co.,* 55 Colo. 146, 133 Pac. 1103; *Tanner v. Harper,* 32 Colo. 156, 75 Pac. 404; *Colo. Mort.*

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& Inv. Co. v. Giacomini, 55 Col. 538, 540, 136 Pac. 1039; *Byron Tel. Co. v. Sheets,* 122 Ill. App. 6; *Johnson v. Northwestern Tel. Exch. Co.,* 48 Minn. 433, 551 N. W. 225.

If it should be determined that the receiver was guilty of negligence there is an additional reason, although along the same line, why the origin of the fire would not be a defense. A common carrier has the right to transport explosives,—but a nuisance may result from a negligent exercise of this right. Endangering life by leaving a car containing a high explosive in large quantities in a location in circumstances which would constitute negligence constitutes a nuisance. In such case it is not necessary to either plead or prove the immediate cause of an explosion of the powder so kept, for the reason that the original and primary cause of an injury resulting from such explosion is the establishment of a nuisance.—*Heeg v. Licht,* 80 N. Y. 579, 36 Am. Rep. 654; *Chicago W. & V. Co. v. Glass,* 34 Ill. App. 364; *Myers v. Malcolm,* 6 Hill. 292, 41 Am. Dec. 744.

There can be no doubt regarding the liability of the D. B. & W. for the tort of the receiver if such tort is established, because, by the terms of its purchase of the property of the C. & N., it assumed this liability. This agreement was for the benefit of those having a claim against the receiver, of which plaintiff is one.—*Knott v. D. & S. C. Ry. Co.,* 84 Iowa 462, 51 N. W. 57. The only question is whether it can be joined as a defendant in this action. Counsel for defendants claim that it can not be, for the reason that the action against its co-defendants was one in tort, while that against it is in contract. The cause of action against each defendant is the alleged tort of the receiver, and its liability therefor. Hence the fact that one may be liable as a wrong-doer, and the other, because it assumed liability therefor, does not make a case of either misjoinder of parties or causes of action, because in such circumstances each is liable

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for the same tort.—*D. & R. G. Co. v. Gunning,* 33 Colo. 280, 80 Pac. 627.

It is urged on behalf of the defendants that because the non-suit against the C. & N. was properly sustained that the action for this reason must also fail as against the other defendants. In an action against several defendants based upon a joint tort the rule is that the plaintiff will be permitted to recover against such of the defendants as his testimony establishes were guilty of the tort charged and the fact that one may be acquitted does not defeat his action as against those found guilty of the tort.—*Denver Omnibus and Cab Co. v. Gast,* 54 Colo. 17, 80 Pac. 727.

The judgment of the district court granting a non-suit against the C. & S. and directing a verdict in favor of the D. B. & W. is reversed, and the cause is remanded for a new trial as to these defendants. In discussing the case we must not be understood as having indicated that actionable negligence was established by the testimony, but that we have only held that from the testimony on the subject the question should have been submitted to the jury.

Judgment affirmed in part and reversed in part and cause remanded for a new trial.

CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

On Petition for Rehearing.

Mr. JUSTICE GABBERT delivered the opinion of the court:

On petition for rehearing it is claimed that we were in error in assuming that there was a joint use of the track by the lessor and lessee. We think not. There is testimony to establish that the terminal facilities, which include the leased portion of the track, were used jointly by the three companies; that Mr. Watrous was the joint

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agent of the C. & S. and C. & N. W. and employed the men who handled the freight for all the roads. The C. & S. handled the freight for both roads, and its foreman of the yards had the disposition, placing and control of the freight cars in and around the station.

We were in error however, in stating that the Denver, Boulder & Western Railroad Company, by the terms of its purchase of the property of the Northwestern Company, assumed liability for the torts of the receiver, when we should have said the company took the property subject to any liability incurred by the receiver. But this does not make any difference with respect to the company being a party, as its property could not be subjected to the payment of any claim growing out of the liability of the receiver until it had an opportunity to defend an action to establish such liability.

Petition for rehearing is denied.

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL concur.

Decided April 6, A. D. 1914: Rehearing denied July 8, A. D. 1914.

[No. 7596.]

CUENIN V. CHLORIDE MINING & PROSPECTING COMPANY.

1. MINING CLAIMS—*Application for Patent—Adverse Claim—Equitable Defense.* Where it appears that whatever right the plaintiff in an adverse suit has in the premises in controversy is equitably the property of the defendant, a non-suit should be entered. It is not necessary to call a jury. It is proper to determine the issues raised upon the equitable defense, in the first instance. (322)

The court may require the adverse claimant to convey to the applicant for patent. (321)

2. ADVERSE CLAIM—*Waiver.* An adverse claim may be waived by a failure to file it within the statutory period, by voluntary dis-

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missal in the land office, by a conveyance to the applicant for a patent, or by discontinuance of the action brought to support it. (323)

Appeal from Saguache District Court.—Hon. CHAS. C. HOLBROOK, Judge.

Mr. G. K. HARTENSTEIN, for appellant.

Mr. HENRY W. RIBLETT and Mr. ALBERT L. MOSES, for appellee.

Mr. JUSTICE WHITE delivered the opinion of the court:

August 16, 1910, The Chloride Mining and Prospecting Company applied for a patent on a group of six mining claims. Thereupon Cuenin filed his adverse in the land office against Chloride No. 4, one of such claims, as being in conflict with his Reva C. claim, and brought this suit in support of the same. The answer conceded the overlapping of the claims, and that the location of the Reva C. antedated that of Chloride No. 4, but set forth in a cross-complaint facts showing that the Reva C. actually and equitably belonged to the Chloride Mining and Prospecting Company, and prayed that Cuenin be required to convey the same to that company and that his adverse claim be dismissed. The issues thus raised by the cross-complaint were tried to the court without a jury, found in favor of the company, and a decree entered as prayed. Cuenin brings the matter here for review. He claims that the cross-complaint did not state facts sufficient to constitute a defense to the suit. We cannot concur in this view of the matter. While the truth of the allegations of the cross-complaint would not determine the validity of the location of either the Chloride No. 4 or the Reva C., or the right of patent thereto, it would, nevertheless, determine the right of possession of the ground in dispute as between the company and Cuenin, and leave for determination only the

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question of the right of the occupant, as against the Federal Government.

When the truth of the allegations set forth in the cross-complaint was established, as it was by ample evidence, it entitled the defendant to a nonsuit as to plaintiff's cause of action. The alleged rights of plaintiff, upon which he based his adverse claim, were, by operation of law, invested in the defendant. Thus plaintiff's apparent cause of action ceased to exist, and, there being no conflict of interest, it was unnecessary that a jury be required to make any findings whatever. Failure of Cuenin to establish title to the Reva C., and the judgment of ownership and right of possession thereto in the defendant, have not relieved the latter of the necessity of establishing its ownership and right of possession to the Chloride No. 4. As said in *Kirk v. Meldrum*, 28 Colo. 453, 459, 65 Pac. 633, 635:

> "Plaintiffs, having failed to prove a cause of action, cannot complain that the action was dismissed. True, their failure to establish title to the Polly did not relieve the defendants from the necessity of establishing their ownership and right of possession to the Ada, if they desired a verdict upon which a judgment could be predicated, affirmatively establishing their ownership and right of possession to the disputed premises. If, however, the defendants did not see fit to introduce evidence and secure a verdict in accordance with the provisions of section 2326 *supra*, that was a matter which they could determine for themselves. The provision in question only prescribes what shall be found by the jury if a verdict is returned. If one party is nonsuited and the action dismissed, as in this instance, the law is not violated, nor is there anything in the law which prohibits this course."

Section 2326 Rev. Stats. of the United States provides, *inter alia*, that where an adverse claim is filed during the period of publication, all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been *settled* or decided by a court of compe-

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tent jurisdiction, *or the adverse claim waived.* The settlement of the controversy or the waiver of the adverse claim does not necessarily depend upon a verdict of a jury. An adverse claim may be waived by failure to file it within the statutory period; by a voluntary dismissal of it in the land office prior to the commencement of the action; by a transfer to the applicant of the interests of the adverse claimant, or by dismissal of the action instituted in support of it. *Lindley on Mines,* Vol. 2, § 766. Upon principle, there can be no difference between waiving the adverse claim by a transfer to the applicant of the interests of the adverse claimant through the latter's positive action, and the transfer of such interests by operation of law. In either event the controversy is settled.

Nor is the appellant in a position to complain that the court first determined the equitable matter raised by the cross-complaint. In any event, the result, when such matters were established by proof, would have been the same, and he is in no wise injured by the action of the court in the premises. Upon the whole record we are satisfied the judgment is right, and it is, therefore, affirmed.

Judgment affirmed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

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[No. 7638.]

GAULT v. CITY OF FORT COLLINS.

1. MUNICIPAL CORPORATIONS—*Powers.* Nothing in Rev. Stat. §§ 5036, or 6525 cl. 10, 54, confers power upon a city to compel the owner of a lot on which is standing an unused privy, with no other building or structure, to connect such privy with the public sewer. (331, 332)

2. ——*Ordinance—Prosecution.* An ordinance provided that "Every privy belonging to any resident etc., located upon any lot abutting upon or near any street or alley through which is a sanitary sewer shall be connected by the owner etc., with such sewer." In a prosecution to recover the penalty prescribed for a violation of this ordinance the court will not consider the regulations of the Board of Health, nor those for the abatement of nuisances. (332)

Error to Larimer County Court.—Hon. FRED. W. STOVER, Judge.

Mr. L. D. THOMASON, for plaintiff in error.

Mr. FRED W. STOW, Mr. HOMER S. STEVENS and Mr. FRANK J. ANNIS, for defendant in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

1. Defendant was tried and convicted before a jury in the County Court, on appeal from the Police Magistrate's court, for violating an ordinance of the city of Fort Collins, and brings the case here on error. There is no written complaint, and no specifications or bill of particulars was filed, setting forth the facts. The suit was begun upon a summons, which, omitting formal parts, is as follows:

> "You are hereby commanded to summon John H. Gault to appear before me at my office, in Fort Collins, Colorado, on the 14th day of July, A. D.

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1910, at 10 o'clock A. M., to answer the complaint of the city of Fort Collins for the violation of sec. 26 Ordinance No. 13 passed and adopted by the City Council of said city on the 16th day of Oct., A. D. 1905, for the failure to pay it a certain demand not exceeding three hundred dollars."

As section 26 was the only ordinance introduced in evidence, it is the only one we can consider, and reads as follows:

"Sec. 26. Every vault or privy, in, upon, or belonging to any residence, factory, mill, warehouse, outhouse, store, office or other building, together with all drainage from bath tubs, sinks, or basins therein located on any lot or lots, or land adjoining to or abutting upon or near any street or alley or other place through which there is a public or district sanitary sewer shall be connected by the owner or owners of such property, or his or their agent or other person having charge of or receiving the rents thereof, with such public or district sanitary sewer. Each month's failure to comply with the provisions of this section shall be deemed a separate offense, unless the person or persons whose duty it is to make the sewer connections herein provided for shall show good cause, satisfactory to the mayor and city physician why he or they should be excused from the performance of said duty."

The city's evidence shows that on the day the summons issued an outside or open privy, or vault, stood near the alley on the rear end of lot 1, block 23, which was in no manner connected with the sewer. Defendant admitted he owned the property, that it was within the city limits, and joined streets and alleys through which there was a public sanitary sewer. The city then rested. The court ruled the only relevant and material question in the case was whether the privy was connected with the sewer, and gave but one instruction to the jury as follows:

"Gentlemen of the Jury: You are instructed by the court to find the defendant in this action guilty as charged, and you are to fix his fine at such

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an amount, not exceeding the sum of one hundred ($100) dollars as in your judgment would seem fit and proper for the violation of this ordinance, under the circumstances set forth in the evidence."

After the jury retired, they returned into court, and the following conversation occurred:

"Foreman of the Jury: I am up against a proposition: Now we don't understand whether we are bound by the instructions of the court to find the defendant guilty.

"The Court: Those are the instructions you are to follow: The amount of fine is for the jury to fix, but as to the question of guilt you must follow the instructions of the court."

The jury again retired and returned a verdict finding the defendant guilty, and assessed his fine at $1.00.

2. The laws of 1907, page 599, provide in substance, that the council in cities of the second class shall have power to establish a sewerage system, and, for that purpose, may divide the city into sewer districts, and compel the owners of buildings located in the district, and the owner of any building located on blocks abutting on any established sewer, to connect with the sewer; that they shall have power to prohibit the keeping or maintaining of any vault, or privy, within the sewer district, or within 400 feet of any established sewer, and shall have power to regulate the construction, maintenance and use of all vaults, closets, privies, and cesspools, within the city limits not within the prohibited districts or proximity of any established sewer.—R. S., 1908, sec. 6564.

The statute delegates to the city four general powers: first, to establish a sewer system and divide the city into sewer districts; second, to compel owners of buildings in a sewer district, or within four hundred feet of a sewer, to connect with the sewer; third, to prohibit privies within a sewer district; and fourth, to regulate, within the city limits, privies not within a sewer district.

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The demand is for violating section 26 of ordinance 13, the power to pass which is based on this statute. The power in this regard conferred by statute is to compel owners of buildings to connect them with the sewer. No power is given to compel parties to connect outside vaults or privies with the sewer. The power regarding privies is to prohibit them, within the sewer district, or within 400 feet of a sewer, not to compel them to connect. If not within the prohibited district, the power then is to regulate the construction, maintenance and use of privies. The section of the ordinance relied on, in conformity with the second power conferred, provides in substance that all buildings on any lot or lots adjoining to or abutting upon or near any street or alley or other place through which there is a sewer, shall be connected by the owner, with the sewer. While there are no written pleadings, the gravamen of the complaint is a failure to connect some building or buildings owned by the defendant, with the sewer. The case made by the city's evidence showed there was a privy standing near the alley, on the back end of the lot, not connected with the sewer. The defendant admitted he owned the lot, and that the property was within the sewer district. He then attempted to show it was a vacant lot with no buildings thereon, and the distance to the nearest habitation; but was not permitted to do so. He was also prohibited from showing whether he used the privy, or whether it was used or unused, and if used, by whom. The court held these matters were irrelevant and immaterial, and instructed the jury as a matter of law to find guilty, without allowing them to pass upon any question of fact. This was error.

We are reminded in the city's brief of statutes which confer power upon municipalities to pass such ordinances as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of the inhabitants of the city. Also to regulate the

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construction, use and repair of vaults, also to declare what shall constitute a nuisance, and to abate the same, and to fine parties who shall establish, continue or suffer nuisances to exist. The city may have ordinances based upon these statutes, but in this case none of them were introduced in evidence, for the sufficient reason the demand was for violating section 26 of ordinance 13. Cities of this class may have the power, under the 45th subdivision of powers, to declare a privy in an established sewer district a nuisance *per se,* and to abate it, and fine the party suffering it to exist. But the proceeding would have to be under an ordinance based upon the power conferred by the statute, and the ordinance must provide the manner of abatement. It could not do this on a complaint for violating section 26 of ordinance 13.—*Wolfe v. Abbott,* 54 Colo. 531, 131 Pac. 386.

The statute gives the city sufficient authority to compel all buildings embraced within the power to connect with the sewer. It also confers ample power to prohibit the keeping of any privy within a sewer district, or within 400 feet of the sewer; but this does not mean the city has power to compel one to connect an outside or open privy or vault with the sewer, who does not desire to make the connection. It can prohibit the maintenance and use of the privy, and can fine the keeper and abate the nuisance, if it is a nuisance, and can compel owners of buildings to connect with the sewer. This would seem sufficient power to rid any sewer district of all privies and vaults, and to compel owners to connect all buildings with the sewer.

For illustration: suppose there was a building and an outside open privy used in connection therewith, standing upon a certain lot; that the building burned, leaving the privy standing, could the owner, after the passage of this ordinance, be compelled to connect it with the sewer? Evidently not. No such power is conferred, nor was it attempted to be exercised by this ordinance. While undoubtedly the city would have power to prohibit the keeping of the privy, it would not have

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the power to compel the party to connect it with the sewer against his will.—*Philadelphia v. Trust Co.*, 132 Pa. 224, 18 Atl. 1114.

3. The ordinance further provides that each month's failure to connect shall be deemed a separate offense unless good cause, satisfactory to the mayor and city physician, be shown by the person why he should be excused from making the connection with the sewer. It is contended by the defendant that this clause invalidates the whole of section 26 because it delegates power to others to declare whether an ordinance is being violated. It is unnecessary to pass upon this question; but if it can be upheld as lawful, the exception must be uniform in its operation and not go by favors, that is, all persons should have an equal opportunity to show good cause why they should not make the connection. This would seem to imply notice, in order that all be given an opportunity to show good cause why they should not connect. Defendant was prohibited on the trial from showing that he had no notice to connect the privy with the sewer. If he had been notified, and given the opportunity, he might have shown good cause, by showing that he did not want to connect an old privy on a vacant lot with the sewer, and would remove it if allowed. Defendant at the time the summons was ordered, and before it was issued, offered to remove the privy if given a reasonable time, and a few days afterwards cleaned it out, filled up the vault with dirt and nailed a board over the seat. While this may have nothing to do with the suit for violating the section which is in evidence, it goes to show the theory of the prosecution was that if the privy was not connected with the sewer at the time the summons was issued, defendant was guilty as a matter of law, and there was no question of fact for the jury. The proof did not sustain the complaint, and the court might well have taken the case from the jury or submitted it upon proper instructions at the close of all the evidence; but it had no right under the circumstances of this case to instruct the jury as a mat-

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ter of law, to find the defendant guilty. The court was mistaken in holding as a matter of law, that merely because the privy was not connected with the sewer, the evidence sustained the demand and defendant was guilty of violating the ordinance.

Reversed.

CHIEF JUSTICE MUSSER and MR. JUSTICE SCOTT concur.

On Petition for Rehearing.

GARRIGUES, J. This action is based upon section 26, ordinance 13, requiring that every privy in on or belonging to any building on any lot near, adjoining to or abutting upon any street or alley through which there is a sewer, shall be connected by the owner with the sewer. The defendant was commanded by the summons to answer the city's complaint for violating this ordinance. The offense charged was the failure to connect with the sewer a privy in, upon or belonging to some building. The city's evidence showed an open privy or vault on the rear end of a lot, not connected with the sewer the day the summons issued. Defendant admitted he owned the lot, and the existence of the sewer, and the city rested. Defendant then offered, and attempted to show that it was a vacant lot, unoccupied and with no buildings thereon; that he had no use for the privy and did not wish to maintain it on the vacant lot, and had, since the summons was served, and before the trial, filled up the vault with dirt and nailed a board over the seat. The court ruled at the suggestion of the city attorney, that these matters were immaterial, sustained the objection to the evidence and directed the jury, over the protest of defendant, to return a verdict of guilty. This was error, and we so held.

Counsel who prepared the brief and argument here for the city, cited subdivision 7, page 599, laws of 1907,

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as authority for the passage of this ordinance. In the opinion, we said the power conferred by this statute was to compel the owners of buildings to connect them with the sewer; that it conferred no power to compel the connection of an outside open privy like this, on a vacant lot, with the sewer, against the owner's will, that the power was to prohibit privies within sewer districts, and to compel buildings to be connected with the sewer.

On petition for rehearing, a new attorney represents the city, and it is said our opinion is wrong, because the ordinance was passed in 1905 while the statute cited, and relied upon by the city in its former brief, was not passed until 1907. It is now urged for the first time that the power to pass the ordinance was not based upon the laws of 1907, but upon the following statutes: Section 7, page 378, laws of 1893, entitled "Public Health" which provides:

"Sec. 7. Boards of Health in counties, cities, towns and villages are hereby empowered to make such rules and regulations in relation to the care and cleaning of privies and water closets, within such counties, cities, towns or villages as it may deem desirable for the preservation of the health of any of the inhabitants thereof, or such boards may declare any such privy or water closet a nuisance and the abatement thereof be by them ordered and enforced."

Subdivision 54, section 3312, page 971, G. S. 1883, which provides: That cities and towns shall have the following powers:

"Fifty-fourth. To compel the owner of any grocery, cellar, soap or tallow candlery, tannery, stables, pig sty, privy or sewer, or other unwholesome or nauseous house or place, to cleanse, abate or remove the same, and to regulate the location thereof."

Subdivision 10, page 542, laws 1889, which provides, cities and towns shall have power:

"Tenth. To construct and keep in repair culverts, drains, sewers and cesspools, and to regulate their use; and all cities and incorporated towns are authorized to assess either in whole or part, except as hereinafter otherwise provided, the cost of the construction of sew-

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ers and drains upon the lot or lots, or lands adjacent to and opposite such improvement, in proportion to the frontage of such lot or lots, or lands, abutting upon the street or alley wherein such sewer or drain is to be laid; *Provided,* That the cost of such sewer or drain at street intersections or crossings shall be wholly paid for by such city or town; *And provided further,* That the benefit to the public generally, if any, shall be assessed against such city or town, and the balance shall be assessed against the lot or lots or lands and the owners thereof, according to frontage as aforesaid, said benefits to be determined as may be provided by ordinance."

The statute of 1893 empowers boards of health to make rules and regulations as to the care and cleaning of privies, and to declare certain privies a nuisance and to order and enforce the abatement thereof. No power is given the city here by ordinance, to compel a privy like this, to be connected with the sewer. More than this, defendant is not charged with violating rules and regulations of the Board of Health of the City of Fort Collins in this regard. He is charged with failing to connect a building in a sewer district, with the sewer. The statute purports to make the failure to comply with rules and regulations of the board of health, a misdemeanor, punishable under the state laws. The city in this case is seeking to collect a penalty in a civil action for the violation of a specific and definite city ordinance. We are not called to pass upon a violation of the rules and regulations of the Board of Health, nor the abatement in any manner, summarily or otherwise of a nuisance. No such question is before us.

Subdivision 54, G. S. 1883, authorizing cities and towns to regulate the location of privies and to compel the owner to clean, abate or remove any nauseous or unwholesome privy, and the laws of 1889 relating to the construction and repair of sewers and cesspools, does not confer power upon cities or authorize them to compel the connection of buildings with sewers, much less the connection of an open privy like this, standing on a vacant lot. It was the passage of the act of 1907 that gave

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power to cities and towns to prohibit all privies in sewer districts, and to compel all buildings in such districts to be connected with the sewer.

Petition denied.

Chief Justice Musser and Mr. Justice Scott concur.

Decided May 4, A. D. 1914: Rehearing denied July 8, A. D. 1914.

[No. 7647.]

McPherrin v. Fair et al.

1. Evidence—*Discrediting Witness.* A witness held discredited by his criminal conduct in the fraudulent alteration of a deed. (336)

2. Contract—*Oral—Validity.* One who, upon a consideration promised, agrees by word of mouth to purchase land for another, advancing the purchase money as a loan to his principal, is bound by the engagement. (337)

If he take title in his own name, or in the name of a third person for his own use, equity will compel a conveyance to the principal.

That at the time of entering into the engagement he is negotiating for the land upon his own account and behalf, is immaterial. (336)

3. Statute of Frauds—*Resulting Trust.* In such case a resulting trust is created by operation of law. Such trusts are excepted from the statute of frauds. Rev. Stat. §§ 2660, 2661. (337)

4. ——*Evidence.* The facts from which the law raises a resulting trust in lands may be proven by parol. (338)

5. Principal and Agent—*Duties and Disabilities of Agent.* One employed to purchase lands for another is not at liberty to take title thereto in his own name, or in the name of another for his use. (339)

Error to Phillips District Court.—Hon. H. P. Burke, Judge.

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Messrs. Allen & Webster, for plaintiff in error.

Mr. Phillip Zimmerman and Messrs. Munson & Munson, for defendant in error, L. E. Fair.

Chief Justice Musser delivered the opinion of the court:

McPherrin obtained from the Westinghouse Company a deed to certain land in the possession of Fair, and to which the latter had a tax title. Before recording the deed, McPherrin changed the name of the grantee from his own to the name of one Jackson, and changed the expressed consideration of $50.00 to $250.00. Thereafter, he caused a conveyance of the land to be made from Jackson to Mail, in whom the apparent title reposed at the commencement of the action in the district court. In justice to Mr. Mail, it should be said that he had no knowledge of the transactions of McPherrin in connection with this land, and disclaimed any interest in himself.

The controversy was to have the title of McPherrin declared to be in trust for Fair, and to compel a conveyance to the latter. It was claimed by Fair that McPherrin was Fair's agent for the purchase of the land, and wrongfully took a deed to himself instead of to his principal, Fair. After a trial, judgment was rendered in favor of Fair, and in the decree the court's findings were recited as follows:

> "The court further finds that E. N. McPherrin was employed by the said L. E. Fair as his agent to purchase the said land in question for the said Fair; that the said E. N. McPherrin violated the terms of his contract with the said Fair in this, that he took the title to the said land in himself, thereafter so altering the deed that the name of J. W. Jackson was inserted therein as grantee in the place of the name of E. N. McPherrin which the said E. N. McPherrin erased; and that thereafter the said

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McPherrin caused the land to be deeded by the said J. W. Jackson to John F. Mail, the plaintiff herein, who has since disclaimed; that neither the said J. W. Jackson nor the said John F. Mail, had any right, title or interest in and to the premises in question, their names being merely used to conceal the transaction, and to conceal the name of the real party in interest, or real grantee, who was E. N. McPherrin.

"The court further finds that no deed was ever executed for the said land to the said Jackson; that the said deed to McPherrin which was afterwards altered by the said McPherrin by inserting the name of J. W. Jackson in lieu of his own as grantee, also contained the original consideration of fifty dollars, which the said McPherrin altered to read two hundred and fifty dollars.

"The court further finds that by the agreement between E. N. McPherrin and L. E. Fair the said Fair was to pay the said E. N. McPherrin the sum of five dollars for his, McPherrin's, services, in purchasing the said land for the defendant Fair, and was also to pay the said McPherrin the sum of fifty dollars, the same being the known price for which the Westinghouse Company was willing to transfer said land; that it was agreed between the said McPherrin and the said Fair that the said McPherrin should advance the fifty dollars for the purchase of the said land for the said Fair, and that the said Fair should thereafter reimburse the said McPherrin for the said fifty dollars, so expended for the purchase of said land, and also should pay the said McPherrin the sum of five dollars for his, McPherrin's, services as aforesaid."

It was adjudged that the title was held in trust for Fair, and that the land should be conveyed to him upon the payment of $55.00 to the clerk of the court for the use of McPherrin.

It is contended by the plaintiff in error that the evidence was not sufficient to support the findings of the court. Fair testified that McPherrin, who was a banker at Holyoke, came to Fair's ranch and asked if the lat-

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ter had bought the land. Fair said that he had made arrangements with the owner, whose headquarters were at Council Bluffs, to buy the land for $50.00. McPherrin said that he was going to Omaha soon, and that for $5.00 he would cross over to Council Bluffs, and get the deed for Fair. The latter consented and told McPherrin that he would come into Holyoke and get the purchase money for McPherrin. The latter said that was not necessary; that he would advance the money as a loan to Fair, and the latter could pay it when the deed was obtained. So it was agreed that McPherrin would advance the $50.00 to Fair as a loan, go to Council Bluffs, get the deed of the land for Fair, and receive $5.00 for his services. McPherrin denied this. Two other witnesses testified that McPherrin told them that he was buying or attempting to buy the land for Fair. This testimony, together with the crude attempt of McPherrin to conceal the name of the grantee in the deed, and the consideration, casts discredit on McPherrin's testimony. Under such circumstances, this court would be unwarranted in holding the evidence insufficient to sustain the findings and judgment of the District Judge, who had the witnesses before him.

Some claim is made that, at the time and before the contract was entered into that McPherrin should act as Fair's agent, McPherrin was negotiating for the purchase of the land for himself. We cannot see what difference that would make. If he made the contract to perform the services for Fair, he was bound by that contract whether he had negotiated for the purchase of the land for himself or not. It may be that the plaintiff in error intends to say that if McPherrin had been negotiating to buy the land for himself it was unlikely that he had agreed to act as Fair's agent. That would be a circumstance for the court to consider in weighing the testimony. However, the circumstance that McPherrin had been negotiating for the land for himself, if it existed, was a two-edged sword. It was plain from the testimony that Fair had negotiated for the land months be-

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fore McPherrin had. Fair knew nothing of McPherrin's negotiations when the contract was made. The owner desired to sell the land to Fair rather than to anyone else. So that McPherrin's agreement to act for Fair may have been considered by the court as a means adopted to stop Fair from further negotiations himself, and thus enable McPherrin to get the land by the concealments which he afterwards practiced.

It is also contended by plaintiff in error that the contract establishing the trust was a parol one, and was within the statute of frauds and void because not in writing. He seems to argue that the trust was an express one. In this he is plainly mistaken. The contract established the relationship of agency between Fair and McPherrin and also that of borrower and lender. There was no contract for a trust. The land was to be deeded to Fair—not to McPherrin. The trust resulted, by operation of law, from the wrongful acts of McPherrin. It was a resulting trust. Our statute of frauds has no application to a resulting trust, for such a trust is created by operation of law.—*Kayser v. Maugham,* 8 Colo. 232, 6 Pac. 803; *Walker v. Bruce,* 44 Colo. 109, 97 Pac. 250. Trusts created by operation of law are expressly excepted from our statute of frauds. Secs. 2660, 2661 Rev. St. '08.

Plaintiff in error argues that it was his money with which the land was purchased. We do not say that it would make any difference if it was, but we do say that plaintiff in error is again mistaken. The fifty dollars with which McPherrin bought the land was by him loaned to Fair. Had McPherrin, at the time the loan was made, taken the money from his pocket and handed it to Fair as a loan it would have been the latter's money beyond a doubt. Fair might then have handed the money to McPherrin to take to Council Bluffs to pay for the land. It would have been Fair's money that passed for the deed. When McPherrin offered to advance the money for Fair, and the latter accepted the loan, the money in the hands of the agent, McPherrin, was Fair's

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as much as it would have been had it actually passed back and forth between them.—*Reitz v. Humphreys,* 53 Colo. 177, 125 Pac. 518; *Hall v. O'Connell,* 52 Ore. 164, 95 Pac. 717.

Thus the case presented by this record is one wherein an agent for the purchase of land pays the money of his principal for it, takes the title in his own name, and claims it for his own. The authorities are unanimous that, in such a case, a trust results in favor of the principal and the facts out of which the trust arose may be proven by parol. Even *Burden v. Sheridan,* 36 Ia. 125, 14 Am. Rep. 505, upon which plaintiff in error strongly relies, announces this universal doctrine as follows:

> "And it has likewise been held in accord with the universal holding of all the authorities that where real estate is purchased by one person with money furnished by another, an implied or constructive trust arises, the former being held as trustee for the latter, and that the facts establishing such trusts may be proved by parol evidence."

In 1 Perry on Trusts, (4th Ed.) sec. 133, it is said:

> "If one should advance the purchase money and take the title to himself, but should do this wholly upon the account and credit of the other, he would hold the estate upon a resulting trust for the other."

In sec. 137, the author states that the transaction, out of which such a trust results, may be proved by parol, and that the statute of frauds does not embrace trusts arising by operation of law. Such trusts result, where in various ways, by loan or otherwise, the money of one person, or its equivalent, pays for land, and the title is taken in the name of another.—*Bates et al. v. Kelly,* 80 Ala. 142; *Lounsbury v. Purdy,* 18 N. Y. 515; *Page v. Page,* 8 N. H. 187; *Kelly v. Johnson,* 28 Mo. 249; *Dudley v. Bachelder,* 53 Me. 403; *White v. Sheldon,* 4 Nev. 280; *Weekly v. Ellis,* 30 Kans. 507, 2 Pac. 96.

In *Rose v. Hayden,* 35 Kans. 106, 10 Pac. 554, 57 Am. Rep. 145, a case like the one at bar, in most, if not all, of the material particulars, except that the agent

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paid his own money without any agreement before hand to advance it as a loan, the court said:

> "The controlling question in this case is not whether the principal advanced the purchase money or not, but it is whether, in equity and good conscience, the agent, who in fact purchased the property with his own money, in his own name, in violation of his agreement with his principal, and in abuse of the confidence reposed in him by his principal, can be allowed to retain the fruits of his perfidy. The weight of authority is, we think, that he cannot." (citing many authorities).

But we are to discuss and determine the case before us with its facts found by the court and sustained by clear evidence and not some other case based on different facts. When this is done the judgment of the District Court appears right under all the authorities, and it is, therefore, affirmed.

Judgment affirmed.

Mr. Justice White and Mr Justice Bailey concur.

[No. 7664.]

Reynolds v. Norman, Administratrix.

Assumpsit—*Implied Promise.* Where the owner of lands upon which is an abandoned mine places the mine and its machinery in possession of another, under express contract that the latter shall unwater it, at his own expense, and the person so placed in possession assumes charge and direction of the work, the land owner is not responsible to those employed therein, even though he occasionally visits the mine, and makes suggestion as to the work. (341, 342)

Otherwise, if, during the progress of the work, he knows, or has reason to believe, that those performing the labor or furnishing the material are relying upon him for their recompense, and makes no effort to undeceive them. (342)

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Error to Boulder District Court.—Hon. NEIL E. GRAHAM, Judge.

Mr. L. M. GODDARD, Mr. GEORGE P. STEELE and Messrs. REED, WEST & GOSS, for plaintiff in error.

Mr. M. M. RINN, for defendant in error.

Mr. JUSTICE WHITE delivered the opinion of the court:

Fitzgerald recovered a judgment against Reynolds and the latter brings the case here for review on error. James Duce was named in the complaint as a co-defendant of Reynolds, but, failing to plead, judgment, by default, was entered against him and the case proceeded against Reynolds alone. The judgment is based upon the value of work alleged to have been performed for, and materials furnished to, the defendants, at their "special instance and request." Of the amount in dispute, $412.00, exclusive of interest, was alleged to be due the plaintiff for work and labor done and materials furnished by him to the defendants, and the balance, being $172.50, exclusive of interest, was claimed by virtue of assignments to the plaintiff of claims for labor alleged to have been performed for the defendants by C. L. Norris and S. C. Harris. The answer of defendant Reynolds was a general denial of the allegations of the complaint.

The case was submitted to the jury upon the theory that a verdict against Reynolds might be found upon either an express or implied contract. Although the evidence was conflicting, it was, perhaps, sufficient to establish a liability against defendant Reynolds upon an express contract for the amount of the assigned accounts, and for the further sum of $115.00, the contract price for a tipple erected by plaintiff on the premises. Whether there was any evidence that would warrant a finding against defendant upon the theory of an implied

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contract for any of the items, is very doubtful. Every article furnished and all labor performed under such assumption, and the acts of the defendant in the premises, were consistent with the theory that the obligations were those of Duce alone, and the circumstances were in no sense misleading to those furnishing the materials and performing the labor.

Reynolds was the owner of a certain ranch in Boulder County upon which was situate an abandoned coal mine full of water. The mine had been at one time productive, but not in operation since Reynolds acquired ownership of the land. There was, however, on the premises, certain machinery which had been used in the operation of the mine, consisting principally of a boiler, engine, tipple, and hoisting apparatus, and the claims in suit grew out of the materials furnished in the repair of this machinery and work, and labor performed, and materials used, in the unwatering of the mine. The evidence shows, without contradiction, that the work of unwatering the mine was undertaken by Duce, on his own account, and for his own benefit, with a view of leasing the mine, under an express contract whereby Reynolds delivered possession thereof to him, and by the terms of which it was definitely agreed that Reynolds should pay no part of the expenses, and that Duce took possession of the mine, made the purchases, and employed the labor, except possibly that comprising the assigned accounts, and the aforesaid cost of the tipple. Moreover, he had full control and direction of the work, and, though Reynolds was occasionally at the mine, he in no sense assumed charge or direction of the work, or did anything in relation thereto, other than to make suggestions concerning the same. Besides, Duce commenced the work, employed the plaintiff, and made a considerable amount of purchases in question, before Reynolds and the plaintiff had any communication or acquaintance with each other. Moreover, a strong presumption arises that plaintiff had full knowledge of the non-liability of the defendant in the premises, except for those things which he

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specifically authorized and agreed to pay. Plaintiff testified that, during the progress of unwatering the mine, the boiler completely broke down, and that Duce told him that in a conversation with Mr. Reynolds the latter had authorized him to find out what it would cost to put the boiler in shape, and subsequently the contract was made direct with Reynolds. Clearly, if Duce and Reynolds were partners in the work it was unnecessary that the former be authorized by the latter to take action in the premises. Furthermore, as to this work, it was conceded that plaintiff was paid therefor, though he claimed that such payment was upon account of the entire claim. This contention, however, is wholly inconsistent with plaintiff's action in the premises. In his account in suit this transaction is not mentioned, nor is there any credit given, though the plaintiff claimed that the payment made by Reynolds was $25.00 in excess of the contract price for the repairs to the boiler, while defendant claimed that such payment was the exact contract price for such repairs. The rule applicable here is tersely stated in *Bailey v. Rutjes,* 86, N. C. 517, 520, as follows:

> "It is unquestionably true, that if in the absence of all express understanding, one stands by in silence (and much more if he actively encourages), and sees work done, or material furnished for work, upon premises belonging to him, and of which he must necessarily get the benefit, and afterwards he does accept and enjoy it, a promise to pay the value thereof may be inferred, and ordinarily will be; and the inference under the circumstances will be purely one of fact, namely, whether the party's conduct has been such that a reasonable man might understand from it, that he meant to recognize the benefit as one conferred on himself, and to pay for it. In such a case, there can be no difficulty in making such an inference against the party, since the premises being his, the benefit of the labor done, or the material furnished, must necessarily result to him, and withal, he had the opportunity and the power to countermand it, if he would.

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"But in the case at bar, the defendants, if their testimony is to be believed, had leased the premises to Rutjes for five years, and he had undertaken to have the improvements made, which called for the use of the lumber furnished by the plaintiff. They were therefore absolutely without the power, either to give or to withhold their sanction to its delivery and use, and ought not to be required to pay for it, unless they knew, or had reason to believe, that the plaintiff was looking to them for pay for his lumber, and allowed him to deliver it under that expectation and without objection on their part.—*Day v. Cayton,* 119 Mass. 513, 20 Am. Rep. 347; *Wells v. Bannister,* 4 Mass. 514. And it was in its failure to call the attention of the jury to this view of the case, that the error of the charge, as we conceive, consists. The instruction given should have been that if the defendants, knowing that the plaintiff expected them to pay for the lumber, acted in such wise as to create a reasonable belief on his part, that they would do so, and thereby induced him to deliver it, then the jury might infer a promise on their part, to pay for it.

"In the present form of action the question is, whether there was a subsisting contract between the parties in regard to the lumber, or not, and the doctrine of equitable estoppel has no application to the case.

"If not originally liable by reason of a contract of some sort, the defendants cannot be made so because of their having resumed possession of the premises with its improvements, upon the surrender of their tenant.

"It is true they thus derive some advantage from the materials furnished by the plaintiff, but that cannot be avoided, as it is impossible for them to reject, or restore to the plaintiff that benefit without a surrender of their own property; and this the law does not require of them to make. Pollock on Contracts, 29. Nor under such circumstances would a promise to pay, made after the lumber had been furnished and used, be binding on them since it

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would be purely gratuitous and as such would make no contract."

However, should we assume the evidence sufficient to warrant submitting the matter to the jury upon the theory of an implied contract, it was error to give, over the objection and exception of defendant, Instruction Nos. 4 and 5 without also giving, in substance, defendant's requested Instruction No. 3. The former instructions are abstract propositions of law, that one who knowingly accepts labor and materials, or the benefit thereof, from another is liable for the reasonable value of the same, except it appears the materials were furnished or the work done as a gift or gratuity. On the other hand, the instruction refused was supplementary to such abstract propositions of law, making them applicable to the facts of this case. Defendant Reynolds ought not to be required to pay for materials furnished, or labor performed, in the unwatering of the mine, unless he knew, or had reason to believe, that the persons so furnishing the materials or performing the labor were relying upon him for pay. The court's failure to call the attention of the jury to this view of the case makes it incumbent upon us to reverse the judgment.

Judgment reversed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE BAILEY concur.

Per curiam.

Within the period allowed for an application for a rehearing, the parties filed a stipulation herein that final judgment be rendered by this court. In accordance therewith the order of reversal is set aside, and judgment ordered entered in favor of the defendant in error against the plaintiff in error for the sum of $287.50, together with interest thereon at the statutory rate of 8% per annum from July 5, 1909, and that the respective parties hereto pay their own costs in the premises.

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[No. 7666.]

DERHAM ET AL. v. HILL ET AL.

1. CONVEYANCES—*Description.* Where there are in a conveyance of lands repugnant descriptions, that which in the light of the attendant circumstances most accords with the intention of the parties must be accepted. (350)

When a particular description is plainly false it should be rejected, and if enough remains to locate the land intended to be conveyed, the deed is effective. (350)

2. ——*Area—Metes and Bounds.* Lots 21 and 28, in a subdivision were separated by a road 40 feet wide. The proprietor of lot 28 executed a deed containing the following description: "the north nine acres, more or less of Lot 28 etc., more particularly described as follows: Beginning at the southwest corner of Lot 21" and running east 640 feet, south 605 feet, west 640 feet, and north to the place of beginning. *Held* apparent that the point of beginning at the southwest corner of Lot 21 was false, and must be rejected; that the north line of Lot 28 must be accepted as the north boundary of the lands intended to be conveyed, that with this line in view as controlling the initial point of the survey, the description by metes and bounds being found to include 8.88 acres, this corresponded sufficiently with the area declared to be conveyed, and fixed its locality; that subsequent purchasers from the grantee in this deed were chargeable with notice of the intention of the grantor so ascertained. (351, 352)

3. PRECEDENTS—*Construction.* Every opinion of the courts is to be construed in the light of the facts and circumstances of the case, giving each fact and circumstance its due weight. (349)

Error to Mesa District Court—Hon. SPRIGG SHACKLEFORD, Judge.

Messrs. LOGAN & MILLER, for plaintiffs in error.

Messrs. WHEELER & WEISER and Mr. SAM B. BERRY, for defendants in error.

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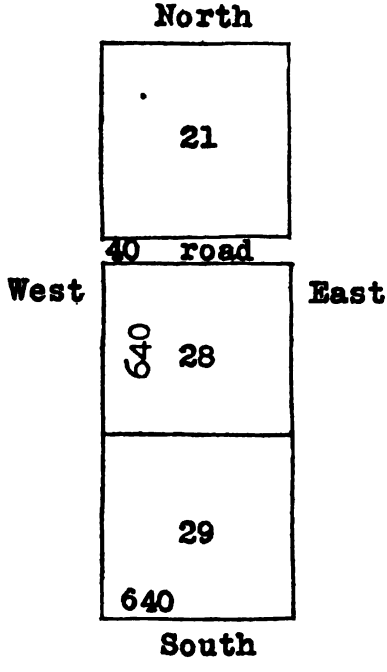
CHIEF JUSTICE MUSSER delivered the opinion of the court:

In 1892, there was made and filed for record, in Mesa County, a plat of more than two hundred acres of land designated as The Grand Junction Orchard Mesa Land Company's Orchard Subdivision. The plat showed the land subdivided into numbered tracts or lots of about ten acres each, with various portions, forty feet wide, marked as roads. The particular lots, with which this lawsuit has to do, appeared on the plat as follows:



One Mrs. Powers became the owner of Lots 28 and 29, by deed, wherein the land was described as Lots 28 and 29 in the subdivision. In May, 1905, she made a deed to one Joynson, containing a description as follows:

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"The north nine (9) acres, more or less, of Lot twenty-eight (28) of The Grand Junction Orchard Mesa Land Company's Orchard Subdivision, more particularly described as follows: Beginning at the southwest corner of Lot twenty-one (21) of The Grand Junction Orchard Mesa Land Company's Orchard Subdivision; thence east six hundred forty feet (640); thence south six hundred and five (605) feet; thence west six hundred and forty (640) feet; thence north six hundred and five (605) feet to the place of beginning:"

In July, 1905, Joynson made a deed to the Hills, defendants in error, wherein the land intended to be conveyed was described the same as in the deed from Mrs. Powers to Joynson. At the time these deeds were made, the road between Lots 21 and 28, shown on the plat, did not appear on the surface of the ground. Lot 28 was covered by fruit trees set in rows east and west and these rows of trees continued north and occupied the road. The Hills went into possession of the land under their deed from Joynson. On the south part of what they supposed was their land, there was first a row of apple trees and next, south, a row of prune trees. There was no fence between Lots 28 and 29, nor any division fence between the land claimed by the Hills and the portion south of it. Just south of the row of prune trees and about a foot or a foot and a half from the trees there was a furrow or ditch and from this the trees on the land were watered, the slope being to the north.

No survey or measurement of the land was made. The Hills supposed that the irrigation ditch south of the prune trees was their southern line or near it. When the dispute arose, measurements were made and it was found that the center of this ditch was about 585 feet south of the north line of Lot 28. In December, 1907, Mrs. Powers conveyed to the Derhams, the plaintiffs in error, Lot 29 and the south thirty-five feet of Lot 28. In the fall of 1911, the portion marked above as "road" was opened up as the result of an action brought for

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that purpose by owners of adjoining tracts. The evidence seems to show that the parties here did not know of the existence of a roadway until it was forced open. Soon after getting their deed, the Derhams made some claim to the row of apple trees and the row of prune trees, just north of the irrigation ditch, which claim was disputed by the Hills and the latter remained in possession of and cultivated the two rows, and gathered the fruit therefrom. The Derhams testified that at the time they bought the land in 1907, Mrs. Powers showed them a plat which she had caused to be made, on which there were shown 42 rows of trees on Lot 29 and part of Lot 28, and she represented that she proposed to convey these 42 rows to the Derhams. It was claimed that these 42 rows took in the south two rows north of the irrigation ditch. There was also evidence that the Derhams set out a row of trees just south of the irrigation ditch and on the land in controversy. If there were 42 rows already set out from the south line of Lot 29 to the row of apple trees north of the irrigation ditch, it is not explained why there happened to be a vacant space south of the irrigation ditch on the land in controversy, on which to set out another row. As no measurements had been made, it is safe to say that none of the parties knew exactly where the dividing line was.

After making the deed in 1907 to the Derhams for Lot 29 and the south thirty-five feet of Lot 28, Mrs. Powers moved away from the neighborhood, evidently to California. Thereafter, the Derhams made claim upon her for more ground, and after some controversy, in December, 1910, she made a quit-claim deed to the Derhams for the south seventy-five feet of Lot 28. The north forty feet of the south seventy-five feet of Lot 28 is the land in controversy. In February, 1911, the Derhams took posession of this forty feet and erected a fence on its northern line about two feet north of the row of apple trees above mentioned, so as to include these apple trees as well as the row of prune trees. About June, 1911, the Hills began an action to recover

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the possession of the forty feet in controversy, which resulted in a judgment in their favor. The court found that by the deeds from Mrs. Powers to Joynson and by the latter to the Hills it was the clear intention of the grantors to convey the land in controversy and that from the receipt of their deed the Hills were in the exclusive possession thereof, and farmed the same until dispossessed by the Derhams.

It is the claim of the Derhams that the deed from Mrs. Powers to Joynson, and from the latter to the Hills conveyed the north 565 feet only of Lot 28, and that the remaining forty feet included in the deeds was embraced in the road. They claim that the description "the north nine (9) acres, more or less, of Lot 28" must be disregarded and the description by metes and bounds with the place of beginning at the southwest corner of Lot 21 must be accepted as the true description of the land conveyed. They say that the words "nine acres, more or less," are merely descriptive and do not control the location by metes and bounds and that the description by quantity must yield to the more certain description.

We do not, in any manner, dispute the many authorities cited to sustain this contention. Had the description in the deed been "nine acres more or less described as follows," and then the point of beginning, and the metes and bounds given as in the deed, or had it started with the point of beginning and the metes and bounds and ended with the words, "containing nine acres, more or less," the quantity might have been of little importance, and the authorities cited might have been applicable.

What is said in this opinion, as is the case in every other opinion, is said in the light of all the surrounding facts and circumstances existing in the case, and each of these facts and circumstances are given weight in arriving at the conclusion reached. When the Derhams took their quit-claim deed they took it with full knowl-

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edge, either actual or constructive, of the facts and circumstances which are mentioned, and having done so they ought to have been apprized with certainty of the land that was intended to be conveyed to the Hills. Where there are two repugnant descriptions in a deed, "the court will look into the surrounding facts and will adopt the description which is most definite and certain and which in the light of the surrounding circumstances can be said to effectuate most clearly the intention of the parties."—2 Devlin on Deeds, sec. 1038; *Wade v. Deray,* 50 Calif. 376.

In construing a deed, the object is to discover and effectuate the intention of the parties to it. While that intention is to be gathered from the language and words of the deed, it should be read in the light of the surrounding circumstances at least when it is ambiguous. —*Am. Nat. Bank v. Madison,* 144 Ky. 152, 33 L. R. A. (N. S.) 597, 137 S. W. 1076.

When a particular of a description is plainly false, that particular should be rejected, and if enough remains to locate the land, the deed is effective.—*Irving v. Cunningham,* 66 Calif. 15. When necessary, where in a deed two descriptions intended to apply to the same land are not reconcilable, evidence of extrinsic facts may be admitted to show the intention of the parties, confining this for the present to such parties as the Hills and Derhams, who each had full knowledge of the extrinsic facts admitted in evidence and referred to herein. And where a deed contains two descriptions of the land conveyed, the one which when applied to the land owned by the grantor is found not true, must be rejected.—*Ornett v. Dumbeck,* 39 Ind. Ap. 482, 78 N. E. 691.

In the deed in question, the description begins, "the north nine (9) acres, more or less, of Lot 28." There is more than mere quantity in this. It states definitely and certainly that all the land intended to be conveyed is in Lot 28 and it fixes the north line of that land as the north line of Lot 28. The beginning in this description is definite and certain. Instead of being a point it is a

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line, to-wit, the north line of Lot 28, marked and limited on the plat as definitely and certainly as any corner of any lot. From this beginning the description certainly proceeds south with a width equal to that of Lot 28 until a line is reached marking the southern limit of an area equal to nine acres, more or less. There is some uncertainty, it is true, in the expression, "nine acres, more or less," but the description by metes and bounds following definitely shows the area of the tract intended to be conveyed and definitely fixes that area as the amount of land contained in an area 605 feet by 640 feet, which the court found to be 8.88 acres and which corresponds to the quantity expressed by nine acres more or less.

Looking closely at the description in the deed, it is plainly apparent that the point of beginning at the southwest corner of Lot 21 is false. It says: "The north nine (9) acres, more or less, of Lot twenty-eight (28) * * * more particularly described as follows: Beginning at the southwest corner of Lot twenty-one (21)," etc. By this language it was an area located entirely in Lot 28, and whose northern boundary was the north line of that lot that was intended to be described by the particular description, and by reference to the plat, it is plain that such an area cannot be described as attempted by beginning with the southwest corner of Lot 21. Such place of beginning is so plainly false that it must be rejected as a point of location of the land conveyed, and when it is so rejected, and retained merely as a point from which to describe an area equal to that conveyed, there appears described an area of ground wholly within and of the width of Lot 28, extending from east to west 640 feet, from north to south 605 feet, and bounded on the north by the north line of the lot.

From the county records, the Derhams, at the time they took their quit-claim deed, had notice that Mrs. Powers, when she made the deed to Joynson, owned Lots 28 and 29 and did not own the forty feet designated as "road," and could not convey such road, and that

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no part of Lot 28 could be exclusively described by including that road. After making her deed to Joynson and her deed for the south thirty-five feet of Lot 28 to the Derhams, Mrs. Powers moved away and exercised no more dominion over any part of Lot 28, while the Hills were in possession and farmed all of Lot 28 north of the 35 feet described in Derham's deed.

As plainly appears from this record, Mrs. Powers intended to convey only land that she owned. If the description, beginning at the southwest corner of Lot 21, were applied to land owned by her, it would not fit, while, if the first description in the deed, together with the area of the tract as stated in the second description, were applied to her land, the description would exactly fit land owned by the grantor. All these facts and circumstances sustain the court below in its finding of what the intention of the parties to the deed was, and the Derhams knew or ought to have known that such was the intention at the time they took their quit-claim deed. The judgment is, therefore, affirmed.

Judgment affirmed.

MR. JUSTICE GABBERT and MR. JUSTICE HILL concur.

[No. 7668.]

KINGSLEY v. CLARK.

1. PRACTICE—*Construction of the Code.* The provisions of the code should receive a construction in harmony with the manifest intent of the legislature, and one which will promote the convenience of parties to causes, and the courts, in the disposition thereof.

2. STATUTE OF LIMITATIONS—*Action Pending.* By the filing of a complaint the court acquires jurisdiction of the subject matter of the cause therein set forth. Where the original summons is returned not found as to one or more of the defendants, and judgment given against

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others who are served, the action is still a depending cause as to the defendants not served, and is continued from term to term, by operation of law, though no formal order of continuance is made. Alias summons may be issued at any time; and service upon them even after the lapse of many terms gives jurisdiction of the person of the defendants so served. (355, 356)

3. SUMMONS—*Alias*, may properly issue as to defendant named in the complaint, after the lapse of many terms subsequent to the institution of the cause, even though no formal order of continuance has been made in the meantime, and though judgment has been rendered as to other defendants, and affirmed on appeal. (356)

The cause is continued from term to term, by operation of law, until, in some manner, final judgment is rendered. (Rev. Code § 43.) (356)

Error to Mesa District Court.—Hon. SPRIGG SHACKLEFORD, Judge.

Messrs. WHEELER & WEISER, for plaintiff in error.

Messrs. TOLLES & COBBEY, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

In July, 1902, the plaintiff, defendant in error here, on behalf of himself and other like creditors of the Colorado State Bank of Grand Junction, brought this action in the District Court of Mesa county, against numerous stockholders, among them the plaintiff in error here, defendant below, to recover judgment for double the amount of the par value of the several shares of stock owned by each of them in that bank, pursuant to statutory provision, the bank having become insolvent and having made an assignment in January, 1901. The return to the summons issued upon the complaint filed therein showed that this defendant could not be found in the county. At divers times thereafter four other summonses were issued, the last being returned into court on the 31st of January, 1903, none of which had any return as to plaintiff in error. On March 14th,

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1903, judgment was rendered against all defendants served, which recited that certain of the defendants, among them plaintiff in error, "were non-residents of the State of Colorado and beyond the jurisdiction of this Court." No continuance was asked as against the remaining defendants, and the case was dropped from the trial calendar. The judgment in that cause was brought to this court and affirmed.—*Adams v. Clark,* 36 Colo. 65, 85 Pac. 642.

On the 13th of April, 1909, plaintiff in error was served within this state with what purported to be an alias summons, together with a copy of the complaint filed in the proceedings nearly seven years previous. His counsel appearing specially filed a motion to quash the so-called alias summons, for the reason that it was issued without authority and is a nullity, which was overruled. On the 29th of June, 1909, a plea in abatement was filed, setting up reasons in support thereof substantially to the effect that at the time of rendition of judgment against the other defendants no order of continuance of the cause for the purpose of obtaining service on this defendant, or for any purpose, was asked or allowed, and no such order has ever been made; and that the court therefore had no jurisdiction over the person of defendant. This plea was met by the objection, which was sustained, that it was not a recognized pleading under the code procedure and laws of this state. Then by answer the same plea in substance was formally set up, and also the six year statute of limitations. A general demurrer was sustained to the answer, excepting as to the statute of limitations. Plaintiff in error elected to stand upon the allegations of his answer in abatement, and plaintiff traversed the averments of the plea of the statute of limitations. Upon trial to the court a judgment for $1,000 and costs was rendered in favor of the plaintiff, which the defendant brings here for review.

The contention that the six year statute of limitations applies is untenable. It provides that the action

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"shall be commenced within six years next after the cause of action shall accrue and not afterwards." Section 4061, R. S. 1908. section 32, Mills' Ann. Code, provides that "Civil actions shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, or by the service of a summons." The record shows that this cause of action accrued in January, 1901, and that less than two years thereafter a complaint was filed and summons issued naming plaintiff in error as a defendant, which clearly was the commencement of the action. In this connection it is argued that, even if this be true, the statute nevertheless ran against the judical process, and the alias summons not having been served within six years after the action accrued, it was at most the commencement of an action as against the defendant after the statute had run. The running of the statute was arrested by the commencement of the suit, and nothing is shown to have occurred since which revived it; its force was spent and it could not be made available against this cause of action.—*Chicago & Northwestern Ry. Co. v. Jenkins,* 103 Ill. 588; *Nevitt v. Woodburn,* 160 Ill. 203, 212, 43 N. E. 385, 52 Am. St. 315; and *Forman v. Brewer,* 62 N. J. Eq. 748, 48 Atl. 1012, 90 Am. St. 475. By its plain provisions the statute of limitations was designed to accomplish but one thing, that of compelling parties to avail themselves of the ordinary means provided for asserting their legal rights in a court of justice within a specified time. To extend it to a situation such as is here presented would plainly be to add something to its provisions, which may not be done by judicial decision, that being solely a legislative function. Certainly the court acquired jurisdiction of the subject matter of the controversy upon the filing of the complaint, and this it retained for the purpose of bringing in all unserved defendants at any time thereafter, and until the whole matter was disposed of either by final judgment or otherwise. This is made clear by the provision of section 39,

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Mills' Ann. Code, which reads: "An alias or pluries summons may be issued and served in like manner as the original at any time." The cause, so far as it concerned the defendant, had been instituted and was pending for the purpose of service upon him at the time the alias summons issued under and by virtue of this provision, and he was thereby properly brought under the jurisdiction of the court. The issuance of the alias summons was connected with, and related back to the original process, and was a mere continuance of the action as originally begun.

Argument is further directed against the failure of plaintiff to ask that the cause be continued from term to term for the purpose of service on the defendant, which, it is claimed, effected a discontinuance of it. There is nothing in the record showing that the cause was at any time formally discontinued. The mere failure to ask such continuance would not divest the court of jurisdiction of the subject matter when once acquired. The cause was not tried or otherwise disposed of, as to this defendant, during the term in which it was begun, and it therefore stood continued as of course. 9 Cyc. 82, 149. When the action was properly commenced it continued, in the absence of an order of the court to the contrary, for the purpose of acquiring jurisdiction of the person of defendant, notwithstanding there was no formal continuance for such purpose. While it would no doubt have been better practice to have asked for such orders from term to term, failure to do so did not work a discontinuance of the cause. This must be so in view of our code provision allowing an alias or pluries summons to issue at any time, the same as an original. The express purpose of the provision is to allow issuance of an alias or pluries summons whenever service is possible, to the end that the cause be put to issue and the controversy determined.

The cases cited by counsel for plaintiff in error upon these propositions, indicating a different rule, rest either upon the common law, or upon code provisions to-

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tally different from our own, and it is therefore unnecessary to discuss or consider them, as they have no application here. The question is solely one of practice, depending on the construction of our code provisions, and, as was stated in substance in *Fisk v. Henarie,* 15 Ore. 89, 13 Pac. 760, such a construction should be adopted as is plainly in harmony with the legislative intent, and such as shall be convenient for the parties in presenting their causes and for the courts in disposing of them. Our code specifically provides for a liberal construction of its provisions for the purpose of doing justice. To permit a defendant, whom a plaintiff has not been able to bring into court, although his action has been properly begun, to evade liability on technical grounds, would certainly not be a liberal construction of these provisions to the end that justice be done, but rather an arbitrary one with the result that a party is permitted, without trial on the merits, to escape altogether.

The record discloses facts which preclude an application of the doctrine of laches, which counsel for plaintiff in error strenuously urge. Under circumstances such as are here presented the matter of time is not controlling. It may be that under some state of facts a comparatively short time would be sufficient to invoke the rule, while in another instance a considerably longer period would not be sufficient to make it applicable. The record shows that at the time of the service of summons on the other defendants, Kingsley could not be found within the county; that at the time judgment was rendered against those served, he was a non-resident of the state; and that he continued a non-resident up to the time of service of the alias summons, which was effected at the first opportunity. The plaintiff acted with all possible diligence in asserting and maintaining his right, and there is no ground upon which to predicate the plea of laches.

The judgment is affirmed.

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CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT concur.

[No. 7783.]

SALISBURY v. LA FITTE.

1. APPEALS—*Finding on Sufficient Evidence*, will not be disturbed.

2. REAL PROPERTY—*Liability to Execution.* The inchoate interest of a purchaser of lands, under an executory agreement for the future conveyance thereof, is liable to execution. (362)

3. CONVEYANCES—*What Must Be Recorded.* A contract for the future conveyance of lands is within § 694 Rev. Stat. An assignment by the purchaser of his right under such contract, not recorded, is without effect as to a creditor of such purchaser who, without notice of the assignment levies an execution upon the land. (360, 361)

4. EXECUTION SALE OF LAND—*Effect.* A sheriff's deed of lands where a levy is made under Rev. Stat. § 3637, takes effect by relation as of the day on which the certificate of levy is filed. (363)

The purchaser at the execution sale succeeds to all the rights of the defendant in execution. Where the defendant in execution holds under an uncompleted executory agreement of purchase, the purchaser at the execution sale acquires the right to proceed with the contract of purchase of which he has so become the involuntary assignee, to make the payments stipulated for in such agreement of purchase, and perform the covenants of the execution defendant therein. (364)

The defendant in execution is under no duty to continue such payments, and payments made by an assignee of the execution defendant whose right is subordinate to that of the execution plaintiff, do not enure to the benefit of the purchaser at the execution sale. (365)

5. JUDGMENT—*When a Bar.* Action to vacate a judgment reviving a former judgment, and the sale of lands upon execution issued pursuant to the judgment of revivor. A judgment therein sustaining a demurrer to complaint, and directing a discontinuance, is no bar to a subsequent action by the same plaintiff for possession of the same lands, under a subsequently acquired title. (367)

6. ESTOPPEL—*Who May Assert.* A party will not be heard to charge his adversary by a supposed admission of what he has himself denied. (368)

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Error to the Court of Appeals.

Mr. GEORGE SALISBURY, for plaintiff in error.

Mr. F. B. TIFFANY, for defendant in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

This is a writ of error to review a judgment of the Court of Appeals, affirming a judgment of the District Court of Larimer County in an action for possession of real property located in that county, prosecuted by the present defendant in error against the plaintiff in error. The opinion of the Court of Appeals is reported in 21 Colo. App. 13.

On August 20, 1900, one Mrs. Taylor, who was then the actual owner of the property by deed duly recorded, executed a written contract of sale thereof to T. C. and Clara Brolliar. On July 8, 1903, the Brolliars assigned in writing their interest in this contract to the defendant in error, who went into possession of the premises. On August 27, 1903, the latter, in writing, assigned her interest in the contract to one Lindenmeier. This assignment must be regarded as a *bona fide* transaction, for the lower court so found upon sufficient evidence.

Neither the contract nor the assignments thereof were recorded until April 6, 1905. On June 27, 1904, Mrs. Taylor conveyed the property by deed to Lindenmeier, which deed was recorded on September 19, 1905. On February 4, 1905, Lindenmeier conveyed the property by deed to the defendant in error, which was also recorded on September 19, 1905. On August 28, 1903, an execution issued on a judgment obtained by George Salisbury against the defendant in error in the District Court of Pueblo County, and, on September 3, 1903, was levied on the property in Larimer County. It is to be

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presumed that the levy was made by filing a certificate thereof in the office of the clerk and recorder.

On the 12th day of November, 1903, the property was sold on this execution to George Salisbury, to whom the sheriff issued a certificate of sale, which was recorded on November 16th, 1903. In due time, a sheriff's deed was issued to the plaintiff in error, to whom the sheriff's certificate of sale had been assigned, and the sheriff's deed was recorded on August 16, 1904, and she went into possession of the property.

No claim is made that either George Salisbury or the plaintiff in error had, at the time of the levy and sale under execution, any notice of the assignment to Lindenmeier of the contract executed by Mrs. Taylor on August 20, 1900, and it affirmatively appears from the record that they had not such notice. It thus appears that before the levy and sale under the execution, the defendant in error had attempted to assign whatever interest she may have had to Lindenmeier, and if that assignment was effective she had no interest at the time of the levy and sale. Plaintiff in error says that by reason of section 694 Rev. Stat. 1908, she was a subsequent *bona fide* purchaser, and the assignment to Lindenmeier had no effect as to her, it not having been filed for record, and she and George Salisbury being without notice thereof. The learned Court of Appeals held that the statute mentioned was not applicable and that the plaintiff in error took nothing by her sheriff's deed because the defendant in error had no interest in the property at the time of the levy and sale, and also for the reason, as is said, that the statute does not apply to the assignment of such an instrument as the contract of sale. Sec. 694 is as follows:

> "All deeds, conveyances, agreements in writing of, or affecting title to real estate or any interest therein, * * * may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such office and not before, such deeds, bonds and agreements in writing shall take effect

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as to subsequent *bona fide* purchasers and encumbrancers by mortgage, judgment or otherwise not having notice thereof."

In view of the opinion of this court, in *McFarran v. Knox,* 5 Colo. 217, the Court of Appeals erred in its holding as will be shown by comparison of that case with the present one. It will also be shown, however, that the plaintiff in error did not acquire the fee simple title to the property and is not entitled to retain possession. The facts in the McFarran case appear in the complaint to which a demurrer had been sustained. For the purpose of comparison, we will state the facts of that case, and after the names there we will place in parentheses the names in this case so as to show the similarity of the facts.

Rose (Taylor), the owner of the property, executed a written contract for the conveyance thereof to Kettlewell (Broillars). Kettlewell (Broillars) assigned this contract to McGovney (La Fitte), who went into possession. McGovney (La Fitte) assigned it to Knox (Lindenmeier). The assignment to Knox (Lindenmeier) was not recorded at the time of the levy and sale under the execution on McFarran's (Salisbury's) judgment, and McFarran (Salisbury) had no notice of it. The two cases differ in that McFarran filed an abstract of his judgment for record after McGovney had assigned to Knox, which then became a lien on the land, while it does not appear that a transcript of the judgment was filed in this case. This difference is immaterial, for the filing of the abstract only marked the inception of McFarran's lien. Here, Salisbury's right had its inception at the time of the levy or sale, and when he was without notice of the assignment to Lindenmeier. McFarran also, at the time of the levy and sale, had no notice of the assignment to Knox, so that had his rights begun with the sale the result would have been the same. —*McMutrie v. Riddell,* 9 Colo. 497, 13 Pac. 181.

In the McFarran case, as here, the contract of conveyance was not recorded. It was held in that case

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that, under sec. 1 Rev. St. 1868, p. 370, real estate subject to execution "included all interest 'of the defendant, or any person to his use, held or claimed by virtue of any deed, bond, covenant, or otherwise, for a conveyance, or as mortgagor of lands, in fee for life, or for years,'" and that the interest of McGovney, held by virtue of the contract for conveyance by Rose, was subject to execution on McFarran's judgment. We have the same statutory provision now—sec. 3609 Rev. St. 1908. So that the interest of the defendant in error in the property in controversy was subject to execution on Salisbury's judgment. It was also held in the McFarran case that an assignment of a contract for conveyance of real estate came clearly within the provisions of sec. 18 Rev. St. 1868, p. 111, which was the same as the present sec. 694 Rev. St. 1908, and that McGovney's assignment to Knox, being unrecorded and unknown to McFarran, did not take effect as to McFarran, though made before the inception of the latter's rights. So here the assignment of the defendant in error to Lindenmeier, being unrecorded and unknown to Salisbury, did not take effect as to the latter, though made before the inception of his rights. This case must, therefore, be regarded, so far as Salisbury is concerned, the same as though the defendant in error had not assigned to Lindenmeier. Unquestionably, therefore, Salisbury bought something at the sheriff's sale. What was it? Sec. 3648 Rev. St. 1908, provides that a sheriff's deed "shall be considered as conveying to the grantee therein named all the title, estate and interest of the defendant or defendants, in the execution therein named, in and to the lands thereby conveyed, of whatsoever nature the same may be." The deed takes effect by relation as of the day of the sale or the day on which the certificate of levy is filed.—*McMurtie v. Riddell, supra.*

If a certificate of levy, under an execution from one county on land in another, is filed in the recorder's office of the county wherein the land is situate, as must be

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presumed was the case here, the deed relates back to the date the certificate is filed. Sec. 3637 Rev. St. 1908. Salisbury, therefore, bought, at the sheriff's sale, and had conveyed to him by the sheriff's deed, all the title, estate and interest of the defendant in error in the land sold, at the time of the filing of the certificate of levy, or for the purposes of this case, if desired, at the time of the sheriff's sale. What was that interest?

The contract of conveyance from Taylor provided that if the contractees therein should first make the payments and perform the covenants mentioned, Mrs. Taylor agreed to sell and convey to the contractees in fee simple, by good and sufficient deed of conveyance, all the land described in the contract, which is the land in controversy. The purchase price was to be paid in small monthly installments, which would run through a number of years. These installments were evidenced by promissory notes payable respectively on the 20th of each month thereafter, and the last one was payable on November 20, 1904. Among other things, it was provided in the contract that time was the essence thereof, and in the event of the nonpayment of said installments, or any part thereof, promptly at the time limited, then Mrs. Taylor was absolutely discharged at law and equity from any and all liability to make and execute a deed, and she might treat the contractees as tenants holding over after the termination or contrary to the terms of their lease. It was further stated that, in the event of the nonpayment of the purchase money, as provided, all payments should be forfeited, and retained as liquidated damages, and Mrs. Taylor might have the right to reenter and take possession of the premises; and it was further stated that, if at any time the contract should be forfeited and determined, as provided, the contractees agreed to surrender and deliver up the premises peaceably, and that if they remained in possession of the premises thereafter, they should be deemed guilty of a forcible detainer of the same and subject to all conditions and provisions stated, and to eviction and removal

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forcibly, or otherwise, with or without process of law. It was further provided that all the covenants and agreements contained in the contract should extend to and be obligatory upon the heirs, executors, administrators and assigns of the parties thereto and each of them.

At the time of the levy and sale, all payments of the purchase price had not been made. A considerable portion thereof remained unpaid—in fact was not yet due. The rights of the defendant in error, at the time, were to have possession of the premises, perform the agreements, make the payments as provided and then to receive a deed conveying to her the fee simple title to the premises. The plaintiff in error could have obtained no greater interest. She could not have obtained the fee because the fee was in Mrs. Taylor, and the defendant in error was not entitled to it. The defendant in error became the involuntary assignor to the plaintiff in error of the contract with Mrs. Taylor, and all the rights of the defendant in error, in and to the contract, ceased with the execution and delivery of the sheriff's deed. By reason of the statute, Lindenmeier obtained nothing by the assignment to him because rights of a *bona fide* subsequent purchaser, without notice, had intervened before his assignment was recorded. The plaintiff in error was the assignee of the contract of conveyance, and it was incumbent upon her to make the payments that had not been made and to perform the covenants and agreements before she would become entitled to a deed conveying the property to her in fee simple. Mrs. Taylor's deed to Lindenmeier conveyed the interest of the grantor in the premises. Lindenmeier's deed to the defendant in error conveyed that same interest of Mrs. Taylor.

In her complaint, in the present case, filed on September 25, 1905, the defendant in error alleged that she was the owner of the premises by virtue of a deed from Lindenmeier; that Lindenmeier had become the owner of the premises by virtue of a deed from Mrs. Taylor, and that Mrs. Taylor had become the owner of the premises

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by successive conveyances from the Government of the United States down. The complaint made no claim of ownership by reason of the written contract of conveyance from Mrs. Taylor. Lindenmeier took Mrs. Taylor's place and was entitled to receive the payments that were unpaid at the time of the inception of the rights of plaintiff in error before the latter could compel a deed, and when the defendant in error received a deed from Lindenmeier she stood in precisely the same position as her grantor. When the defendant in error filed her complaint she stood in the same relation to the plaintiff in error that Mrs. Taylor would have stood, and that is as an owner of the premises, seeking to obtain possession from one holding the premises under a contract which had not been performed.

After the defendant in error had lost her rights under the contract from Mrs. Taylor, by reason of the sheriff's sale and deed, she was under no duty to the Salisbury's to continue the payments, nor was Lindenmeier. The latter did continue to make them and when completed received a deed from Mrs. Taylor. He had a right to purchase Mrs. Taylor's interest, subject, of course, to the rights of the Salisbury's under the contract, which had been acquired by the sheriff's sale and deed. The defendant in error had the right to acquire Mrs. Taylor's interest, subject to the contract, and when she did acquire it, it did not inure to the benefit of the plaintiff in error. The fact that the payments were made by Lindenmeier, or if the defendant in error had made them, in accordance with the contract, is immaterial. Either of them had the right to purchase Mrs. Taylor's interest and pay for it as they chose satisfactory to Mrs. Taylor. In law, as between the Salisbury's, and Lindenmeier, and the defendant in error, the contract, from the time of the sale, became the property of the plaintiff in error upon the delivery of the sheriff's deed. Mrs. Taylor's interest has never been in any way acquired by the plaintiff in error, nor has she shown that

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she was ever entitled to it, though the present action was not begun until after the recordation of the deeds to Lindenmeier and the defendant in error, and not until more than a year after the issuance of the sheriff's deed. On the contrary, she asserted that the defendant in error paid the purchase money and the evidence shows that Lindenmeier paid it. She further asserted that her sheriff's deed was paramount to Mrs. Taylor's deed to Lindenmeier, and the latter's deed to the defendant in error, thereby declaring that she need not and would not perform the covenants of the contract of sale which she had obtained through the sheriff's sale and deed.

Had all the payments been made at the time of the inception of the rights of the plaintiff in error; that is, if the defendant in error had been at that time entitled to a deed from Mrs. Taylor, the question presented would be entirely different. Herein, the facts of the present case differ radically from those of the McFarran case. In the latter case, the complaint alleged that McGovney was the owner of the premises by virtue of the written contract of conveyance. That was a suit in equity. The allegation was the equivalent of alleging that the payments had all been made, and the other covenants performed, so that McGovney was entitled to a deed and in equity was the owner of the premises. That allegation with the others led this court to say that the complaint stated a cause of action. But, in this case, the plaintiff in error was never the owner of the premises either in law or in equity, by reason of the sheriff's sale and deed. The interest which she acquired by virtue of the sheriff's sale and deed was one thing, and that was taken away from the defendant in error, and she became a stranger to the title; but the interest that the defendant in error had at the time she filed her complaint—the Taylor interest—was an entirely different and other interest from that which she had lost by reason of the sheriff's sale and deed.

The contract provided that if the payments were not made as therein required, Mrs. Taylor or her as-

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signs would have the right to reenter and take possession of the premises, and that all the rights of the holder of the contract of sale from Mrs. Taylor would cease and determine. The answer of plaintiff in error and the evidence in this case show that her rights under the contract of sale, which were the rights she acquired by the sheriff's sale and deed, had determined, and that the defendant in error was entitled to the possession of the premises, by virtue of the contract and the title that had come to her from Mrs. Taylor.

The Court of Appeals also held that a judgment in a former suit, sustaining a demurrer to and dismissing a complaint filed by defendant in error, was not an adjudication of the matters involved in the present case. In this the court was right. The former judgment was reviewed by this court upon error.—*La Fitte v. Salisbury,* 43 Colo. 248, 95 Pac. 1065. That action was brought to annul a revival of the judgment in Pueblo County and to set aside the sheriff's sale, at which the property involved in this action and other property of the defendant in error was sold. It was sought to set aside the sale because the judgment of revival was void, as was claimed, and because, as was alleged, the property was sold for a grossly inadequate sum. That action related only to the judgment of revival, and the sale on execution. The complaint was filed after the sheriff's deed had issued, and several months before the deed from Lindenmeier to the defendant in error was executed. All that the judgment determined was that the revival judgment and sale were valid and ought not to be set aside. In the complaint in this action, defendant in error did not mention the revival judgment or sheriff's sale, or in any manner indicate that she desired to disturb them. In this action she asserted her rights subsequently acquired and which came from Mrs. Taylor. There is no connection between the matter involved in the present action and that which was involved in the former one, except that the plaintiff in error is attempting to hold under the

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same sheriff's deed, the validity of which is not now assailed. The question in this case is, what did the plaintiff in error acquire by her valid sheriff's deed, and what became of that which she acquired?

In the complaint in the former action, the defendant in error alleged that she was the owner in fee of the property mentioned therein, which was the property now in controversy and other property at the time of the sheriff's deed. The plaintiff in error asserts that the Court of Appeals erred in holding that the defendant in error was not estopped by this allegation. In the opinion of the Court of Appeals, it is said that the plaintiff in error, in the answer in that action, denied that the defendant in error had any title to the premises, and that if the admission of the plaintiff to the action would estop her, then the denial of the same matter by the defendant in the action would estop her, and the result would be nothing, and the court further proceeds to hold that the allegation could be shown to have been made by mistake. As a matter of fact, the plaintiff in error was not in a position to claim, for any reason, that the defendant in error was the owner of the premises in fee at the time of the sheriff's sale, for her answer in this present case shows that the defendant in error was not such owner. The plaintiff in error is surely bound by the allegations in her answer. In that answer, by way of cross-complaint, she alleged the sheriff's sale; the issuance of a sheriff's certificate to George Salisbury; the assignment of that certificate to herself; that the sale was made under an execution issued on the Pueblo judgment; the agreement from Mrs. Taylor to the Broillars, and its assignment to the defendant in error and by her to Lindenmeier; that Lindenmeier never paid anything for the assignment; that it was kept secret with an intent to swindle the plaintiff in error out of the property, and was not recorded; that Lindenmeier received the warranty deed from Mrs. Taylor after the defendant in error had paid for the land, according to the agreement, with the intent of holding the title to the

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property in trust for the defendant in error. If the defendant in error paid the purchase money according to the agreement (the evidence showed that Lindenmeier paid it), then at the time of the sheriff's sale all of the monthly payments had not been made, for according to the agreement, which was set out in the cross complaint, the last was not to be made until November, 1904. It thereby conclusively appears in the said answer that at the time of the sheriff's sale at least twelve of the payments had not been made, and were not yet due, and that some of them were unpaid and not due, at the time of the issuance of the sheriff's deed, showing conclusively that at the time of the sale the defendant in error was not the owner in fee of the premises, but that she was simply the owner of whatever interest the incompleted contract gave her. The cross-complaint further alleged that the deed from Lindenmeier to the defendant in error was given without any consideration and was withheld from record until September, 1905. It alleged that the plaintiff in error obtained her sheriff's deed and recorded it on the 16th day of August, 1904, and that it conveyed to the plaintiff in error all the right, title and interest that the defendant in error had on the 16th day of November, 1903, the date that the sheriff's certificate of sale was recorded, and that the sheriff's deed and the title of the plaintiff in error related back and took effect as of said last mentioned date. It alleged that the plaintiff in error was without notice of the assignment to Lindenmeier, or of the deeds; that the sheriff's deed was prior and paramount to the deeds made by Mrs. Taylor to Lindenmeier, and by the latter to the defendant in error, and that the plaintiff in error relied upon the sheriff's deed as an estoppel upon the defendant in error because the assignments of the contract of Mrs. Taylor were fraudulently withheld from record until the 6th day of April, 1905, and that she relied upon the further fact, as an estoppel, that both of the deeds were withheld from the record until the 19th day of September, 1905. In this cross-complaint, whatever title the plaintiff in error had

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to the property was fully set out, as was also the title which the defendant in error had, and on its face it appeared that the defendant in error, at the time of the sheriff's sale, owned only such interest as the incompleted contract from Mrs. Taylor gave her, and that she did not own the fee. It also appeared in the cross-complaint that the plaintiff in error obtained, by her sheriff's deed, only such title as the defendant in error had under the contract. It also appeared that the plaintiff in error never completed the contract or made or offered to make the payments, and that she had never been the owner of or entitled to the fee in said premises, and that by her failure to perform the contract and make the payments she had forfeited all the rights she had obtained through her sheriff's deed. She seems to contend that because Lindenmeier and the defendant in error acquired the Taylor interest and kept the deeds from the record until September 19, 1905, without notice to her, that she was defrauded. Lindenmeier and the defendant in error owed her no duty except that the one who held the fee and to whom plaintiff in error might tender the balance due on the contract, if the tender was made in time, would be obliged to deed the property to the plaintiff in error. They had the right to obtain the Taylor interest, with or without the knowledge or consent of the plaintiff in error. If the latter had not forfeited her rights under the contract before, she had until the commencement of an action for possession against her to pay the balance due. If she had the right to tender the payments in her answer, she has not done so, but, on the contrary, asserts that she does not need to, and will not make them, by alleging that she is the owner of the fee, and that her deed is paramount to that of Mrs. Taylor and that of Lindenmeier.

Under such circumstances, the right of the owner or her grantee to re-enter and take possession of premises against a defaulting vendee, under such a contract as that of Mrs. Taylor, is certainly complete. When the deeds were recorded she had notice where the Taylor interest

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reposed. She had then time to tender the payment before the commencement of the action, and did not do it. On the contrary, she claims to have absorbed the Taylor interest without complying with the Taylor contract.

Plainly, under the pleadings in this case and under the evidence, the defendant in error is entitled to possession of the property, and the judgment is affirmed.

Judgment affirmed.

Mr. JUSTICE HILL and Mr. JUSTICE BAILEY concur:

Decided April 6, A. D. 1914. Rehearing denied June 1, A. D. 1914.

[No. 7796.]

CITY AND COUNTY OF DENVER v. LATHAN ET AL.

EMINENT DOMAIN—*Modifying Report of Commissioners—Power of the Court.* Where the Commissioners act under a misapprehension of law, the court may so modify their report as to make it comply therewith. (372)

Where upon error to the order in such case no suggestion is made, nor authority cited, to show that the court erred in its conclusions either of law or fact, the order will be affirmed without investigation. (373)

Error to Denver District Court.—Hon. GEORGE W. ALLEN, Judge.

Mr. H. A. LINDSLEY, Mr. THOMAS R. WOODROW, Mr. W. H. BRYANT, Mr. JAMES A. MARSH, for plaintiff in error.

Mr. HALSTED L. RITTER, for defendants in error.

Mr. JUSTICE HILL delivered the opinion of the court:

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The city and county of Denver instituted this action to acquire by right of eminent domain for street and alley purposes two strips of land. The commissioners appointed for the purpose assessed the value of the land taken for street purposes, as well as the alley, at specified sums. They found that no damage would result to any other property by reason of the taking; that the street improvement would be of general benefit to the city, and assessed against it a certain amount. They also found that certain lands in the vicinity of that taken for street purposes would be specially benefited, and assessed each parcel thereof the amount they determined it would be specially benefited. They found and assessed against the owners of the land abutting on the proposed alley certain amounts upon account of benefits by this improvement. This latter assessment was in harmony with the provisions of Section 6592, R. S., 1908.

Objections were filed to the report of the commissioners by about every one to be effected. The court overruled those as to the alley, and sustained the most of those pertaining to the street improvement, which resulted in changing the report of the commissioners concerning the territory, and the special benefits to be assessed, upon account of the street improvement. The city brings the case here for review.

The only questions urged by the city involve the effect of the report of the commissioners, the weight to be given it as evidence, and what facts must be disclosed before the court is justified in setting it aside, rejecting or changing it. This question was fully considered in case No. 6936, *Phipps et al. v. City and County of Denver,* decided at this term, *ante*—. It was there held and stated that the authorities all agree that in case the commissioners have acted under a misapprehension of the law the court is justified in changing their report to comply therewith. The court rendered its judgment in favor of the objectors, landowners, upon a different state of facts which involves other questions of law than the commissioners were attempting to follow. If the court

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was correct in its conclusion of facts and the law applicable thereto, it was justified in changing the report of the commissioners. The city has not claimed or cited any authorities to show that the court was wrong in either, for which reason the judgment will be affirmed without an investigation by us of these questions and without approving or disapproving the correctness of the legal position assumed by the court in its disposition of the case.

The judgment is affirmed.

Affirmed.

Decision *en banc.*

Mr. JUSTICE WHITE dissenting.

[No. 7851.]

CHITTENDER v. HILL ET AL.

Error to Denver District Court.—Hon. GEORGE W. ALLEN, Judge.

Mr. JOHN T. BOTTOM, Mr. MILNOR E. GLEAVES, for plaintiff in error.

Mr. JOHN A. GORDON, for defendants in error.

Per Curiam:

As no prejudicial error appears in the record, and it does appear that justice has been done, the judgment is affirmed.

Judgment affirmed.

Decision *en banc.*

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[No. 7854.]

LOUDEN IRRIGATING CANAL & RESERVOIR COMPANY ET AL. v. THE TOWN OF BERTHOUD

1. APPEALS AND ERROR—*Appellant Must Show Injury.* A decree will not be disturbed upon the complaint of a party who shows no specific injury. (380)

2. ——*What May Be Assigned for Error—Consent.* A party will not be heard to complain of a decree to which he expressly consented. Even allegations of a departure from the statute, in a statutory proceeding, will not be considered. (380)

3. ——*Questions not Presented Below.* Appellant will not be heard to contend in the court of review that his consent to a decree, in the District Court, was obtained by fraud, where no such contention was made below. (380)

4. ——*Errors not Assigned.* Findings not assigned for error will not be disturbed. (380)

Appeal from Boulder District Court.—Hon. HARRY P. GAMBLE, Judge.

Mr. L. R. RHODES, Mr. N. C. FARNWORTH, Mr. JOHN H. SIMPSON, for appellants.

Mr. FRED W. STOW, Mr. P. D. NELSON, Mr. HOMER S. STEPHENS, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

In 1904, proceedings were instituted in the District Court of Boulder county under the General Adjudication Statutes of the State of Colorado, for the purpose of adjudicating priorities of rights to the use of water in Water District No. 4. Afterward the town of Berthoud, the appellee herein, filed its statement of claim in said proceedings. The court appointed T. M. Robinson as referee to take testimony generally and report his findings and proposed decree to the district court.

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The referee proceeded to take testimony, and afterward filed his findings and proposed decree. Subsequently the city filed a supplemental statement. On the 4th day of March, 1907, it being made to appear to the court that the Big Line Ditch Company, claimant of an irrigation ditch, had not received notice of the pendency of the proceeding to adjudicate the priority rights of said ditch, and desiring to offer evidence in said matter to establish its priority of right to the use of water for its said ditch, and that the referee theretofore appointed, T. M. Robinson, was at that time a non-resident of the state of Colorado, an order was entered to re-refer the case to Christian A. Bennett as referee, to hear evidence, and to report his findings in the entire proceeding, both upon the evidence theretofore produced, and to be produced thereafter, and to propose any additional or supplemental decree to that proposed by the former referee. Referee Bennet reported his findings and proposed decree to the District court on the 30th day of April, 1909. The final date for the consideration and hearing upon any exceptions and objections to be filed to such referee's report, was set for the 18th day of March, 1912, at which time all parties interested who had filed exceptions and objections to the proposed decree appeared before the court where such exceptions were heard, and on that day all such exceptions and objections were overruled, and a decree entered by the District Court confirming the findings and proposed decree of the last named referee. The court in the decree and at the time, fixed the first day of April, 1912, as the date and time for making formal exceptions to the decree entered by the court on the said 18th day of March, 1912.

The statement of the city shows that it commenced the construction of its pipe-line November 1st, 1886; that the pipe-line derives its supply of water from the Big Thompson creek, through the Handy Ditch; that the water is conducted through said ditch, and a lateral thereof, into a reservoir, and from thence by a pipe-line to the city; that from April to September water is drawn from said reservoir to supply the city; that from September

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to March in each year water is stored in the reservoir and conveyed by pipe-line to the main pipe-line and through which it is conveyed to the city; that said city has an appropriation for filling said reservoir, of nine cubic feet per second of time for said purposes through said pipe-line. The supplemental statement shows an enlargement and extension of the city's pipe lines, and alleges that its system of water works, including reservoirs, pipe-lines and filter plant, is owned by the city, and prays for an additional finding respecting the enlargement, and for a decree awarding it the priorities and appropriations necessary for the use and enjoyment thereof.

Prior to the entering of the said decree, all interested parties disclosed by the record, and including the appellants, with the exception of the Big Thompson Ditch and Manufacturing Company, filed their joint stipulation and agreement that the decree proposed by the referee, should be entered as the decree of the court.

This stipulation was filed on the 30th day of April, 1909, and omitting the signatures is as follows:

"It is further stipulated and agreed by the Town of Berthoud that it will on or before January 1st, 1920, build and construct from the head of the present pipe-line to a convenient point on the Big Thompson River, a pipe-line or water main of sufficient size and strength to economically carry and deliver to said Town of Berthoud such water as is necessary to supply its needs for domestic and municipal purposes; Provided, however, that the failure to build said pipe-line or water main shall in no case work a forefeiture, or in any wise affect, the three feet of water hereinafter decreed, and the only penalty to attach to such failure shall be the loss of the right to use the six feet additional water also hereinafter mentioned, which shall terminate on January 1st, 1920.

It is further stipulated and agreed that the case now pending in the District Court of Boulder County on the Petition of the Town of Berthoud for the transfer of nine cubic feet of water from Priority No. 1, Ditch No. 1, to the

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headgate of the Handy Ditch, shall be dismissed at Petitioner's costs upon the entering of the decree as herein stipulated, to-wit."

On the 1st day of April, 1912, the date fixed for making formal exceptions to the decree theretofore entered in the said proceedings, the appellants herein appearing for the first time, filed with the district court certain exceptions and protest to that portion of the decree concerning the right and appropriations of the said city.

The protest and exceptions were supported by affidavits and in so far as important to consider, are as follows:

"That after T. M. Robinson, as referee, had made his report, the town of Berthoud began proceedings in the District Court of Boulder County to transfer nine cubic feet of water from the Big Thompson Ditch No. 1, which had priority No. 1, on the Big Thompson River to the headgate of the Handy Ditch, to be used by the town of Berthoud for the purpose of operating its water works, but the said town of Berthoud made no filing with the said T. M. Robinson of such evidence or claim.

That on or about the 1st day of June, 1909, and while said transfer suit was pending, and while Christian A. Bennett was acting as referee in the matter of priorities, it was represented to protestants that the town of Berthoud would abandon that transfer suit and, in lieu of its rights to water from the Big Thompson No. 1, agree to the following stipulation (which stipulation being the same as above set out).

That at the time these protestants signed said stipulation they were led to believe the town of Berthoud was the owner of nine cubic feet of water, of appropriation No. 1 from the Big Thompson River, being Big Thompson Ditch No. 1. And this was the water that the town of Berthoud was seeking to transfer. That these protestants signed said stipulation believing that the town of Berthoud was the owner of this particular nine feet of water.

That after these protestants had signed said stipulation, and the same had been filed with the referee,

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Bennett, the town of Berthoud dismissed its suit to transfer the said nine feet of water from Priority No. 1, Big Thompson Ditch No. 1, and state that the town of Berthoud was not the owner of said nine feet of water, but simply had an option thereon, to purchase from one Stevens, and that after it had secured the stipulation to be filed with the referee, Bennett, it abandoned its option, and that since the time of the abandonment of its option, the town has had no appropriation of water, or owned any appropriation of water except the appropriation set out in the statement of claim filed by it before the referee, T. M. Robinson.

That the decree proposed by the referee, Bennett (being the decree which was afterwards signed by the court), has no foundation, in fact was not based upon any appropriation of water from the Big Thompson River, and that it had no other basis other than the stipulation above set out. That there is no statement on file of this matter, upon which to base the decree as it applies to the town of Berthoud; that there is no evidence to support it; that it is not based upon any priority or appropriation made from the Big Thompson River, either by the town of Berthoud nor anyone else, to which it has succeeded; that it is an arbitrary and unwarranted decree, having no foundation in fact.

That this court has no jurisdiction to grant any such decree; that it cannot amend a decree unless it is based on some actual appropriation made from the river.

That even if said stipulation had been obtained properly, and in good faith, it would not have conferred upon the court or the referee any jurisdiction to make such a decree, ante-dating all priorities from the Big Thompson River; that same would be a fraud upon all other appropriators and a fraud upon the state."

The decree entered by the court upon the stipulation as before stated, and to which these exceptions and objections were made, is as follows:

"It is therefore ordered, adjudged and decreed by the court that the town of Berthoud shall have the per-

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petual right to take from the Big Thompson River three (3) cubic feet of water per second of time as Priority No. 1 for domestic purposes as against all of the users of water from said river, except as against the city of Loveland, which city shall have equal priority with said town of Berthoud, at all times, for domestic purposes, to be temporarily diverted and carried by means of the Handy Ditch, during the irrigation season only, until a pipe-line shall be constructed from said river to said reservoir and terminus of the present pipe-line at all seasons of the year. Until said pipe-line is constructed, at such times during the irrigation season as there is not sufficient water for the needs of said town by reason of loss from seepage and evaporation in said Handy Ditch, additional water not exceeding six (6) cubic feet per second of time may be temporarily diverted into said Handy Ditch when required, in amount sufficient to supply the needs of said town, and no more, and no portion thereof shall be taken or used by any other water consumer from said Handy Ditch. After January 1, 1920, and prior thereto, if said pipe-line shall be extended to said river, the right to use said additional six (6) cubic feet of water per second of time aforesaid shall cease and determine. And that the proper officers enjoined with the duty of distribution of water in said water district shall at all times be governed by this decree in the distribution of water to said town of Berthoud."

The said exceptions and objections were overruled by the court and from which action this appeal was taken.

Whether the appellants or any of them presented objections to the making and entering of the proposed decree does not appear, but it is not suggested that they did not have due notice thereof, or that they were not present, and no exceptions or objections appear to have been made or preserved at the time. Nor is error assigned for any such reason.

The objections and exceptions presented here, and the overruling of which is here assigned as error, were first presented on the 1st day of April, 1912, after the decree had been entered on the 18th day of March, 1912.

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The stipulation for the entering of the proposed findings and decree was on file with the court for about three years before the decree was entered. It can make no difference that the appellant, the Big Thompson Ditch and Manufacturing Company, did not sign the stipulation, for it was a party to the proceeding with due notice.

Beside, the record nowhere discloses that this party has any rights or interests affected by the decree. Neither does the record disclose any specific injury or damage to any one of the appellants by reason of the decree in favor of the appellee; nor that such question was presented to the District Court for determination; nor does it appear that the question of fraud in obtaining signatures to the stipulation was made an issue upon the hearing. Indeed the judgment was not only entered without objection, but with the express consent of two of the three parties appealing.

Counsel for appellants broadly contend that the decree is not warranted by any statute of the state, and that it was entirely beyond the power and jurisdiction of the court to enter it. But no tangible questions in this regard were presented for the consideration of the trial court, nor here.

The court in that part of its decree not herein quoted, expressly preserved the rights of all parties to the appropriation and use of the waters of the stream for irrigation purposes as theretofore adjudicated.

The exceptions and objections so presented after the decree was entered, are based upon the alleged misapprehension under which the stipulation was signed. But the judgment must be said to rest primarily upon the findings of the referee, and not upon the stipulation, which must be held to be no more than the consent of parties to the entry of such judgment. The findings of the referee are not questioned on this appeal, and therefore cannot be disturbed by this court in this proceeding.

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Counsel contend that the referee and the court seem to have proceeded on the theory that appropriations of water for domestic purposes, made at any period, takes precedence over all appropriations for other purposes, and assert that this is not the law. If so, it was the duty of appellants to have raised the question before judgment was rendered and they can not be permitted to do so afterward.

In this state of the record there does not appear to be any question for the determination of this court, properly here on appeal.

Judgment is affirmed.

CHIEF JUSTICE MUSSER and JUSTICE GARRIGUES concur.

[No. 7895.]

JAMES ET AL. v. ASPELIN.

1. FRAUD—*Pleading.* Action to annul a contract for fraud. The complaint set forth the alleged false and fraudulent representations, plaintiff's reliance thereon, his ignorance of the facts, and that he was deceived and misled by such false representations. *Held* sufficient. (382)

2. ——*Contract Induced by Fraud—Assignment and Reassignment—Effect.* Plaintiff sued to vacate a contract alleged to have been induced by fraud. It appeared by the reply that prior to the discovery of the fraud he had assigned the contract to a third person, and this, it was contended, destroyed his right of action. Considering that the assignment was procured by defendants, was without consideration, and a continuance of the fraud, and that prior to the institution of his action plaintiff had procured a reassignment, and so placed himself in position to be able to surrender whatever he might have acquired in the fraudulent transaction, the contention was repelled. (382, 383)

Error to Rio Grande District Court.—Hon. CHARLES C. HOLBROOK, Judge.

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Mr. JAMES P. VEERKAMP, Mr. ALBERT L. MOSES, Mr. JESSE C. WILEY, for plaintiffs in error.

Messrs. PALMER & TRUE, for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

This action is to annul a contract and recover the money paid thereunder upon account of fraud, false representations, wilful deceit, etc. Upon trial to the court the decree was in favor of the plaintiff. It is claimed that the complaint fails to state a cause of action. No substantial reasons are presented in the brief why such is the case. It contains the allegations of facts pertaining to the false and fraudulent representations, wilful deceit, etc., with the further statement of his ignorance thereof that he relied upon them, was deceived thereby, etc., and upon account thereof was damaged to the extent of the money he paid to the defendants. We think its averments are sufficient in these respects.

The next assignment pertains to the admissions contained in the plaintiff's replication. They disclose that under the terms of the contract he purchased for $1,000.00 an undivided one-fortieth interest in what purported to be certain water filings on the Russell Springs Lakes, and the Russell Springs, situate in Saguache county, where it was proposed to construct a reservoir with intake, outlet, etc., for the purposes of handling certain water, which it was alleged the defendant's fraudulently stated they had appropriated by virtue of these filings, but which, according to the evidence of certain witnesses, was never in existence and was not to be had. It appears that after the execution of this contract a corporation was formed by the defendants to take over this property, and the plaintiff was, by these defendants, induced to assign his contract from them to this corporation, under some understanding or arrangement whereby he was to accept stock in the corporation in lieu of his interest evidenced by the contract. But his replication further discloses that the

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corporation never did anything in the way of construction, and soon after this assignment, and prior to the bringing of this action, the corporation reassigned the contract to him. It is claimed that this replication shows that he parted with any cause of action he might have against the defendants, and for that reason that he had not, at the time of the institution of this suit, any cause of action against them. This might have been true (a question unnecessary to consider) had he not secured the reassignment of the contract back to him prior to the institution of the suit. When this fact is taken into consideration with the evidence that it took him some time to wake up to the fraud which had been perpetrated upon him, and that the assignment was in continuation of the fraud, and without consideration, and that when he ascertained these facts he secured its reassignment, so that prior to the bringing of the action he was in a position to surrender the contract, the objection is not well taken.

Sundry objections are made to the reception of evidence. It is unnecessary to examine them in detail. The trial was to the court. From a casual perusal of the record it is evident that the court did not receive any incompetent evidence which might be considered as prejudicial to the rights of the defendants, when we further consider that the cause was in equity and the complaint included sundry allegations of facts pertaining to fraud, deceit, etc.

It is earnestly urged that the evidence is insufficient to support the findings. To sustain this contention counsel cite *United States v. Maxwell Land Grant et al.*, 121 U. S. 385, 30 L. Ed. 949, 7 Sup. Ct. 1015, and *Wilson v. Morris,* 4 Colo. App. 242, 36 Pac. 248, both of which are to the effect that to sustain a cause of action of this character the evidence must be clear, unequivocal and convincing, and as stated by our Court of Appeals "the resulting proof must be established beyond a reasonable doubt." We have no criticism to offer pertaining to these declarations; when applied to this case it is sufficient to say we are of opinion that the resulting proof

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comes within the rule of both. To analyze the evidence in detail would avail no useful purpose.

The judgment is affirmed.

Affirmed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

[No. 7926.]

THE CITY OF COLORADO SPRINGS v. STARK.

CONSTITUTIONAL LAW—*Private Property Damaged by Public Improvement—Municipal Corporation Liable.* A city is liable for injuries occasioned to private property by the construction of a subway, in a public street, which allows passage by the public under the tracks of a railway company. (387)

The fact that the railway company constructs the improvement under license of the city does not change the result. *Denver v. Bayer* 7 Colo. 113; *Idaho Springs v. Woodward*, 10 Colo. 104; *Sorenson v. Greeley*, 10 Colo. 369; *Denver Co. v. Bourne*, 11 Colo. 59 distinguished, as announcing the just and salutary rule that where an improvement is made for the benefit of private individuals, these must bear the burden of making compensation for any injury occasioned thereby. (387, 388)

Error to El Paso District Court.—Hon. JAMES OWEN, Judge.

Mr. C. L. MCKESSON, Mr. HENRY C. HALL and Mr. J. L. BENNETT, for plaintiff in error.

Mr. CLARENCE M. HAWKINS and Mr. JOHN R. SMITH, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

On February 15th, 1912, E. R. Stark, defendant in error, filed an amended complaint in the district court

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of El Paso county, against the City of Colorado Springs, plaintiff in error, alleging damages to his property abutting on Pike's Peak Avenue in that city, caused by the construction of a subway in such avenue, under the tracks of the Atchison, Topeka & Santa Fe Railway Company, hereinafter called the company. The facts are undisputed. Pike's Peak Avenue is one of the main thoroughfares of the City of Colorado Springs, extending from the business district east to the corporate limits, and was crossed by the tracks of the company at the time its road was constructed through the city. The crossing is near the company's passenger depot, which is situated approximately 200 feet south thereof and on the west side of the right of way. Because of increased business of the company and the nearness of its depot to the crossing, Pike's Peak Avenue, which is crossed by the railroad there at grade, was at that point closed to traffic a large part of the time. In the spring of 1909 the city passed an ordinance providing for the vacation of a portion of Pike's Peak Avenue, and another street, and authorizing the company to construct a subway at the crossing. The property involved consists of three contiguous lots on the north side of Pike's Peak Avenue, north of the subway, adjacent to the company's right of way and on the west side thereof. The subway, as constructed by the company under and by virtue of the ordinance, was 50 feet wide, in the center of Pike's Peak Avenue, beginning at a point 250 feet west of the west line of its right of way, passing under the tracks with a clearance of about 12 feet, and having a grade of approximately eight per cent. This left portions of the street about 45 feet wide on each side of the excavation, which were graded and paved at from three to four and one-half feet higher than the established grade along the south line of the lots, that is, graded practically on a level from where the subway begins to dip to the railroad tracks. A bridge 38 feet wide was constructed over the east end of the subway, next to the west side of and parallel with the tracks; also a cement wall 75

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feet long and 6 feet high, extending north from the inner side of the bridge, along the right of way and nearly paralleling the east side of plaintiff's property, and across the sidewalk running east and west in front thereof, on Pike's Peak Avenue. Thus the lots were about four feet lower than the newly established street grade, and from two to twelve feet higher than the subway grade. Free and easy access to them from one side, by the sidewalk which had theretofore extended east across the tracks, was made impossible, and ingress and egress were substantially impeded. For the damage thus occasioned plaintiff sued the city.

The city demurred to the complaint generally, and specifically for the reason that the company was a necessary party. The demurrer was overruled, and the defendant relies for a defense on the ground that the company alone is liable. At the close of plaintiff's evidence the city moved for non-suit, because the evidence was insufficient to sustain a verdict against the defendant; for the further reason that the city did, or omitted to do, no act for which it was liable to the plaintiff; and that the evidence showed that the company alone was liable for the damage which plaintiff had sustained. This motion was overruled and exceptions reserved. The jury returned a verdict for plaintiff for $4,000. A motion for a new trial was overruled. Judgment was entered upon the verdict, to review which the defendant brings the case here.

Counsel agree that a single question is presented for determination. Is the city liable to the defendant in error for injury to his property resulting from the construction of the subway in Pike's Peak Avenue by the company?

Section 15 of article II of the constitution provides that "private property shall not be taken or damaged, for public or private use, without just compensation." All of our decisions involving a construction of this provision in the class of cases under consideration are in harmony. The difficulty arises in fixing liability in individual cases. The facts disclosed are closely analo-

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gous to those in *Pueblo v. Strait,* 20 Colo. 13. The only ground upon which counsel for plaintiff in error challenge that authority is that the question of liability of the company was not there raised. It is not apparent how that can materially affect the rule as to the city's liability. The general principles announced in that decision have been approved and followed.—*Denver v. Bonesteel,* 30 Colo. 109, 69 Pac. 595; *Shutt Inv. Co. v. Pueblo,* 11 Colo. App. 439, 54 Pac. 644; *Leiper v. Denver,* 36 Colo. 110, 35 Pac. 849, 7 L. R. A. (N. S.) 108, 118 Am. St. Rep. 101, 10 Ann. Cas. 847; *Harrison v. Tramway Company,* 54 Colo. 593, 131 Pac. 409, 44 L. R. A. (N. S.) 1164. The rule is stated in the *Strait* case, citing *Denver v. Bayer,* 7 Colo. 113, 2 Pac. 6, and other authorities, to the effect that for an injury resulting from reasonable or ordinary change and improvement of a street, for the benefit of the public, if made in a careful and skilful manner, no recovery can be had by the injured property owner; but that such rule does not apply where the municipal authorities have made an unusual change in the street, or put it, or allowed it to be put, to an extraordinary or unanticipated use. It was held in that case that the building of a viaduct in a street by the city, whereby ingress and egress to abutting property was adversely affected, is such an extraordinary use of the street as could not have been anticipated at the time of dedication, and that the abutting property owner could recover for injury to his property on that account. This rule is equally applicable to subways, and the facts disclosed by this record clearly bring the case within the announced rule. The subway was, and could only have been, constructed upon the authority of the city; it was an improvement primarily for the benefit of the public, and since it was not an ordinary and usual use of the street, the city is liable for damages occasioned by its construction. Such liability, under the facts disclosed by this record, has been affirmatively declared again and again in this jurisdiction, and the judgment before us must therefore be affirmed. The municipality cannot shift or evade liability by procuring or

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permitting another to do the work. Whether the company is also liable is a matter of no concern here. Cases from other jurisdictions, under different constitutional, statutory and charter provisions have no application.

To support the contention that the city is not liable, counsel rely upon *City of Denver v. Bayer, supra,* followed in *Idaho Springs v. Woodward,* 10 Colo. 104, 14 Pac. 49, and *Idaho Springs v. Filteau,* 10 Colo. 105, 14 Pac. 48; *Sorensen v. Town of Greeley,* 10 Colo. 369, 15 Pac. 803; *Denver & R. G. Ry. Co. v. Bourne,* 11 Colo. 59, 16 Pac. 839. A careful examination of these cases discloses that, contrary to those on which this decision is based, the injuries for which recovery was sought grew out of damage to private property for private benefit. The distinction is noted and emphasized in the *Bayer* case in the following language:

> "But the construction of an ordinary railroad is not, as we have found, an improvement of the street for the convenience and benefit of the local public; it is a private enterprise, for private profit."

These decisions are based upon the broad and equitable principle that those who reap the benefits of improvements must bear the burden of compensating for any loss occasioned in securing them. They depend upon the proposition that where the use inures primarily to the profit and advantage of individuals, or to private or *quasi* public corporations, just compensation for injury thereby occasioned must be made to the abutting property owner by those so benefited. In the case at bar the improvement was in the broadest sense of a public character, which could not have been reasonably anticipated; it was primarily for the safety, benefit and convenience of the public, and the city is in the first instance, under the well settled rule in this jurisdiction, clearly and unquestionably liable for damage to private property occasioned by its construction, on the highly equitable and wholesome principal that since the benefit is general the cost incurred to obtain it should be generally distributed. This doctrine is pertinently stated in *Pueblo*

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v. Strait, supra, at page 21, 36 Pac. 792, 24 L. R. A. 392, 46 Am. St. 273, as follows:

> "The rule is certainly more reasonable and just which requires compensation to be made by the municipality out of the common fund, for an injury occasioned by an improvement for the public convenience, than to require the individual to suffer the entire loss."

In *Harrison v. Tramway Company, supra,* the general rule of liability or non-liability of municipalities to abutting property owners for changes and improvements made in streets is succinctly and lucidly stated at page 598 in this language:

> "Moreover, it is certain from our decisions that a municipality in this state may use or authorize its streets to be used for all ordinary and necessary uses to which city streets are usually subjected, and to such further local uses and means of conveyance as the law-making power may have authorized for the streets and thoroughfares of the entire city, and that incidental injuries arising from a careful exercise of those rights are *damnum absque injuria,* but as to extraordinary or unusual uses or unreasonable changes in the street, no such immunity exists."

Judgment affirmed.

Mr. JUSTICE GABBERT and Mr. JUSTICE WHITE concur.

[No. 7951.]

HAYDEN V. TOWN OF AURORA.

1. MUNICIPAL BONDS—*Bona Fide Purchasers,* may rely upon the recitals thereof. (401)

2. ESTOPPEL—*By Conduct.* A municipal corporation issuing negotiable bonds for the purchase of water works, reciting full compliance with statutory requirements, will not be heard, as against a *bona fide* purchaser thereof, to deny that the ordinance authorizing the purchase was duly published. (401)

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Error to the Court of Appeals.

Mr. HUGH MCLEAN, Mr. RODNEY J. BARDWELL and Mr. EDGAR MCCOMB, for plaintiff in error.

Mr. WILLIAM A. BRYANS, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

The Town of Fletcher, now Aurora, on July 1st, 1901, issued its 150 bonds for $1,000 each, for the purchase of a water works. The ordinance pursuant to which these bonds were issued was numbered 10. This suit is to recover upon forty one of them. The only defense upon which proof was offered, or upon which reliance is had by the town in the present record, is that the ordinance in question was never published in a newspaper as required by law, or at all, and is therefore of no validity. To the defense the plaintiff, claiming to be a holder for value before maturity without knowledge or notice of any defect in the ordinance, interposed a plea of estoppel, because of the recital in and certificate to the bonds. Trial was had to the court, which made special findings of fact as follows:

> "First: That the newspaper, the Denver Times, was of general circulation in said town at the time of the passage of Ordinance No. 10, shown in the record, and that said Ordinance No. 10 was never published in said newspaper or any other newspaper published in or of general circulation in said town.
>
> "Second: That the plaintiff is a *bona fide* holder of the bonds in suit, and purchased them in the usual course of business for value before maturity, in June, 1906, without notice of any defense.
>
> "Third: That the defendant town, from the year 1891 to about the year 1901, annually passed an ordinance levying a tax for the purpose of paying interest on the bonds in controversy, in accordance with said Ordinance No. 10, and with the pro-

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ceeds of such tax paid interest coupons on the bonds in controversy herein for the years 1893, 1894, 1895 and 1896."

On these findings judgment was accordingly rendered, in favor of the plaintiff and against the town in the sum of $74,449.00. Upon review the Court of Appeals reversed that judgment, 23 Colorado Appeals, 1. To review the latter judgment plaintiff brings the case here on error.

The issues are comparatively simple, but involve vital questions of law, relative to the rights of innocent purchasers of municipal bonds. While the plaintiff in error relies upon a number of propositions for a reversal of the judgment of the Court of Appeals, and the affirmance of the judgment of the District Court, in our view but one question, as hereinafter noted, need be considered or determined, that being conclusive of the entire controversy.

In section 6525, subdivision 6, R. S. 1908, is found the basic authority giving power to cities and towns to issue bonds for the construction of water works, which, so far as it relates to the matter under consideration, reads as follows:

> "Sixth.—To contract an indebtedness on behalf of the city or town and upon the credit thereof, by borrowing money or issuing the bonds of the city or town, for the following purposes, to-wit: * * * for the purpose of the purchase or construction of water works for fire and domestic purposes; * * * and no loan for any purpose shall be made, except it be by ordinance, which shall be irrepealable until the indebtedness therein provided for shall be fully paid, specifying the purpose to which the funds to be raised shall be applied, and providing for the levying of a tax not exceeding, etc. * * *; but no such debt shall be created, 'except the supplying of the city or town with water,' unless the question of incurring the same shall, at a regular election of officers for the city or town, be submitted to a vote of such qualified electors of the city or town as shall, etc. * * *"

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The statutes of this state provide that the mayor shall preside at all meetings of the board of trustees, and that the clerk shall make a true and accurate record of all the proceedings, rules or ordinances made, adopted and passed by the board, § 6581, R. S. 1908; that all ordinances shall be published in the manner specified in the statutes and shall not take effect or be in force until the expiration of five days after such publication; that as soon as may be after their passage they shall be "recorded in the book kept for that purpose and be authenticated by the signature of the presiding officer of the council or board of trustees and the clerk"; and that the book of ordinances herein provided for shall be taken and considered in all courts of this state as *prima facie* evidence that such ordinances have been published as provided by law, § 6673, R. S. 1908.

Recorded in the ordinance book of the town, duly attested by the mayor and recorder, under a heading which reads as follows: "Public notice is hereby given to all parties concerned that the following ordinances have been passed by the board of trustees of the Town of Fletcher at the dates specified, and are now in effect, having been published as by law required," is found the ordinance which provides for the purchase of a water plant and the issuance of the bonds in question in payment. This ordinance describes the property to be purchased, provides for the issuance of the bonds, levies a tax for the purpose of payment to be held and used for no other purpose, with a provision for the gradual retirement of the bonds after five years; and it then declares that the ordinance shall be irrepealable until the indebtedness is fully discharged. The record upon this matter is absolutely clear. Even if a prospective purchaser, in an endeavor to satisfy himself as to the regularity of these bonds, out of an abundance of caution, examined the records, nothing would have been discovered to create suspicion. An ordinance would have been found providing for the issuance of the bonds, duly recorded in the ordinance book, authenticated by the

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proper authorities, under a heading which gave express notice that it had been published according to law.

Such being the statutory provisions, and such the action taken thereunder by the town trustees in the passage of the ordinance under which the bonds were issued, we now note the sweeping character of the recital in the body of the bonds, and the certificate of the town officers to them, as follows:

> "This bond is one of a series of one hundred and fifty bonds of like tenor and date, numbered from No. 1 to No. 150, both numbers inclusive, and amounting in the aggregate to one hundred and fifty thousand dollars, which have been issued in pursuance of an ordinance of the Town of Fletcher irrepealable until the payment of these bonds, passed by the Board of Trustees of said town on the eighth day of June, 1891, entitled 'An ordinance in relation to Water Works Bonds,' and also under and by virtue of and in full compliance with an act of the General Assembly of the State of Colorado, entitled 'An act in relation to Municipal Corporations' approved April 4th, 1877, and an act amendatory thereof approved March 2nd, 1887."

The certificate thereto reads thus:

> "And it is hereby certified that this issue of bonds is for the purpose of purchasing Water Works for Fire and Domestic purposes, and further that all the provisions of said ordinance and said act have been complied with and that all acts, conditions and things, requisite to be done precedent to, and in the issuing of said bonds, have been done, happened and performed, in regular and due form as required by law."

By section 7 of the ordinance it was provided that "the mayor and other officers of the Town of Fletcher are hereby directed and instructed to issue said bonds in the name of the town, and to carry out the terms and provisions of the ordinance." The bonds were signed by the mayor, attested by the town recorder under the corporate seal, and countersigned by the town treasurer. The signatures appearing upon the bonds were

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shown to be the genuine signatures of the persons acting as mayor, recorder and treasurer of the town. The record shows that these bonds contained not only the broad recitals of full compliance with the requirements of the ordinance and statutes in that behalf, but that they contained the full text of the ordinance itself, and of the statute which authorized the town to issue them. The record further discloses that annually for ten years the town levied a tax to pay the interest on these bonds, and for four years actually paid it. This shows conclusively that the effort to repudiate is purely an afterthought, and that for years the bonds were accepted and treated, without question, as just and binding obligations.

Assuming, as we are bound to do, for the court below so found and the evidence warrants no other finding, that the plaintiff in error is an innocent purchaser for value before maturity, we proceed to a consideration of the law applicable to the only question which need be considered in the case, namely, is the town estopped by the recital in the bonds, and the certificate thereto, to deny that the ordinance in question was published as required by law?

In the opinion in this case reversing the judgment of the trial court, the Court of Appeals held that the recital in the bonds and the certificate thereto did not estop the town from denying that there had been a publication of the ordinance authorizing the officers to issue them. That conclusion was reached on the authority of *National Bank of Commerce v. Town of Granada,* 54 Fed. 100, 4 C. C. A. 212, a case which had already been overruled in *Evansville v. Dennett,* 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; *Board of County Com'rs of Haskell County v. National Life Insurance Co.,* 90 Fed. 228, 32 C. C. A. 591; *Hughes County v. Livingston,* 104 Fed. 306, 43 C. C. A. 541, and *Fairfield v. Rural Independent School District,* 116 Fed. 838, 54 C. C. A. 342. Our Court of Appeals, being of opinion that these opinions had not thus affected the decision in the *Granada* case, applied the doctrine of that case as above indicated, thus falling

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into the fundamental error of failing to distinguish between cases where there is a total lack of authority to issue bonds under any circumstances, and cases like this, where there is a clear grant of power to issue them upon compliance with certain precedent conditions, such compliance depending wholly upon the action of the trustees and general officers of the town.

Since the rendition of the decision in this case by our Court of Appeals, the United States Circuit Court of Appeals of the Eighth District, in two cases, *Town of Aurora v. Gates,* and *Town of Aurora v. Wilder,* reported in 208 Fed. Rep. 101, 125 C. C. A. 329, unanimously affirmed judgments against the town on bonds of the identical issue here in suit. The issues in those cases were precisely the same as here. Some of the same bonds were sued upon, the plaintiffs in both cases, like the present plaintiff, were *bona fide* purchasers for value before maturity, and the same defense was presented, namely, failure of the town to publish the ordinance in a newspaper as required by law, from which failure it is urged the invalidity of the bonds necessarily resulted, the respective parties being represented by the same counsel, and the same arguments being urged. In the opinion in those cases the Circuit Court of Appeals flatly denied the correctness of the contention of the town, declaring it to have been estopped by the recital in and the certificate to the bonds, and upheld their validity; and further it was held that as early as 1895, in *Evansville v. Dennett, supra,* the decision in the *Granada* case had been overruled, and likewise that in numerous decisions of that court since the decision in the *Dennett* case had the *Granada* case been discredited, notably in *Board of County Com'rs of Haskell County v. National Life Ins. Co., supra; Fairfield v. Rural Independent School District, supra; Hughes County v. Livingston, supra,* and in many other decisions of that court. So that it is plainly evident that the decision of our Court of Appeals, in declaring that the recital in and the certificate to the bonds in suit did not estop the town

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from denying that the ordinance giving the officers power to issue them had been published as required by law, rests upon the decision in a case which has been overruled and denied, not only by the Supreme Court of the United States, but by the very court itself which originally promulgated that decision. It is therefore manifest that unless our Court of Appeals decisions can be upheld upon some independent reasoning therein contained, it must of necessity be overruled, and the judgment resting on it be reversed. We have examined with the utmost care and consideration that opinion and find no reason assigned therein to support the conclusion on this point independent of the decision in the *Granada* case. It is impossible to sustain that decision without disregarding the settled rule of the federal courts, as expressed in the many well-considered opinions of both the Supreme Court of the United States, and the Circuit Court of Appeals of this and other circuits.

The recent opinion of the Circuit Court of Appeals hereinbefore referred to is so broad and comprehensive, and so clearly sets forth the principles upon which the town is estopped to deny the validity of the ordinance under which the bonds were issued, that we largely content ourselves by quoting therefrom some of the fundamental propositions therein laid down, upon which the doctrine of estoppel against the town, in this class of cases, rests. At page 104 of the opinion this is said:

> "A municipality or a quasi municipality may not, by the recitals or certificates in its bonds, estop itself from denying that it is without power to issue them when the laws are such that there can be no state of facts or of circumstances under which it would have authority to emit them. But, if the laws are such that there might under any state of facts or of circumstances be lawful power in the municipality or quasi municipality to issue its bonds, it may, by recitals therein, estop itself from denying that those facts or circumstances exist and that it has lawful power to send them forth, unless the constitution or act under which the bonds are is-

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sued prescribes some public record as the test, and no such test was prescribed in this case, of the existence of some of those facts or circumstances.—*Chaffee County v. Potter,* 142 U. S. 355, 364, 12 Sup. Ct. 216, 35 L. Ed. 1040; *City of Evansville v. Dennett,* 161 U. S. 434, 441, 443, 446, 16 Sup. Ct. 613, 40 L. Ed. 760; *Stanly County v. Coler,* 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126; *Waite v. Santa Cruz,* 184 U. S. 302, 320, 22 Sup. Ct. 327, 46 L. Ed. 552; *Quinlan v. Green County,* 205 U. S. 410, 419, 27 Sup. Ct. 505, 51 L. Ed. 860; *Presidio County v. Noel-Young Bond Co.,* 212 U. S. 58, 65, 67, 69, 70, 29 Sup. Ct. 237, 53 L. Ed. 402; *Board of Com'rs v. Sutliff,* 97 Fed. 270, 277, 38 C. C. A. 167, 173; *National Life Ins. Co. v. Board of Education,* 62 Fed. 778, 789, 792, 10 C. C. A. 637, 648, 651; *City of Huron v. Second Ward Savings Bank,* 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534; *Wesson v. Saline County,* 73 Fed. 917, 919, 20 C. C. A. 227; *City of South St. Paul v. Lampbrecht Bros. Co.,* 88 Fed. 449, 453, 31 C. C. A. 585, 589; *Board of Com'rs of Haskell County v. National Life Ins. Co.,* 90 Fed. 228, 231, 32 C. C. A. 591, 594; *Hughes County v. Livingston,* 104 Fed. 306, 311, 43 C. C. A. 541, 546; *Independent School District v. Rew,* 111 Fed. 1, 7, 49 C. C. A. 198, 204, 55 L. R. A. 364; *Fairfield v. Rural Independent School District,* 116 Fed. 838, 840, 841, 54 C. C. A. 342, 344, 345. If the town had published the ordinance under which the bonds were sent forth, it would have had ample authority to issue them and to make the recital and certificate they contain. There might therefore have been a state of facts under which it would have had authority to issue the bonds and to make the recital and certificate they contain, and it was within the power of the town to bring that state of facts into existence. The town, therefore, had the power, by a recital or a certificate in the bonds to the effect that this state of facts existed, to estop itself from denying its existence for the purpose of defeating the bonds and the coupons which innocent purchasers had bought in reliance upon that recital or certificate."

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And again at page 106 thereof the following:

"After the decision of the Supreme Court in *Evansville v. Dennett,* and after a careful reconsideration in the light of all the authorities of the question decided in *National Bank of Commerce v. Town of Granada,* 54 Fed. 100, 4 C. C. A. 212; *Hinkley v. City of Arkansas City,* 69 Fed. 768, 773, 16 C. C. A. 395, and *Post v. Pulaski County,* 49 Fed. 628, 1 C. C. A. 405, this court, as early as 1898, overruled its decision in those cases, followed the decision of the Supreme Court, and declared the law upon this subject to be this: The recital in municipal bonds that they were issued in accordance with the provisions of the enabling statute, imports that they were sent forth in pursuance of a lawful and proper resolution or ordinance and of just and proper action by the governing board of the municipality. It relieves the innocent purchaser of all inquiry, notice, or knowledge of the record, action, or omission of the municipal board or council or of the other officers of the municipality and estops the municipality from denying that a lawful resolution or ordinance was passed and proper action was taken.—*Board of Com'rs v. National Life Ins. Co.,* 90 Fed. 228, 231, 32 C. C. A. 591, 594. In the year 1900 in *Hughes County v. Livingston,* 104, Fed. 306, 316, 43 C. C. A. 541, this court declared that this proposition had been repeatedly affirmed and that it was no longer open to debate, citing *National Life Ins. Co. v. Board of Education,* 62 Fed. 778, 792, 10 C. C. A. 637, 651; *Rathbone v. Board of Com'rs,* 83 Fed. 125, 131, 27 C. C. A. 477, 483; *City of South St. Paul v. Lampbrecht Bros. Co.,* 88 Fed. 449, 453, 31 C. C. A. 585, 589; *Board of Com'rs v. Heed,* 101 Fed. 768, 41 C. C. A. 668; *Wesson v. Saline County,* 73 Fed. 917, 919, 20 C. C. A. 227, 229. Since the decision in *Hughes County v. Livingston,* the proposition has been reaffirmed by this court in *Independent School District v. Rew,* 111 Fed. 1, 7, 49 C. C. A. 198, 204, 55 L. R. A. 364, and in *Fairfield v. Rural Independent School District,* 116 Fed. 838, 840, 841, 54 C. C. A. 342, 344, 345."

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And further, beginning at page 107, the court said:

"The second argument against the estoppel is: The mayor, treasurer, and recorder, the officers who issued the bonds, derived their power to issue them and to make the recital and certificate therein from the ordinance. The ordinance did not take effect or have force until it was published, and it never was published. Therefore these officers never had any power to issue the bonds or to make the recital and certificate they contain, and they are all ineffective. But the ordinance by its express terms granted the power and imposed the duty on these officers to issue the bonds. They could not lawfully issue them without the publication of the ordinance. The only condition precedent to the vesting of their power to send forth the bonds was the publication of this ordinance, and by the statutes and by the direction of the board of trustees contained in the ordinance to issue the bonds they were empowered and directed to publish it. The statutes provided that the ordinance should not take effect until the expiration of five days after its publication; that as soon as possible after its passage it should be recorded in the book of ordinances and be authenticated by the signatures of the mayor and the clerk; and that this record of it in the book of ordinances should be *prima facie* evidence of its publication. It was therefore within the power and it was the duty of the officers who signed and issued these bonds to publish the ordinance. It was within their power and it was their duty to ascertain and decide before they authenticated the record of the ordinance by their signatures, and before they issued the bonds that the ordinance had been lawfully published, and the case falls within these indisputable rules of law:

"The recitals in municipal bonds by the officers or the representative body invested with power to perform a precedent condition and with authority to determine when that condition has been performed, that all the requirements of law necessary to authorize the issue of the bonds have been complied

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with, precludes inquiry, as against an innocent purchaser for value, whether or not the precedent condition had been performed before the bonds were issued.—*Platt v. Hitchcock County,* 139 Fed. 929, 933, 71 C. C. A. 649; *Clapp v. Otoe County,* 104 Fed. 473, 481, 45 C. C. A. 579, 587; *City of Huron v. Second Ward Sav. Bank,* 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534; *National Life Ins. Co. v. Board of Education,* 62 Fed. 778, 792, 793, 10 C. C. A. 639, 651, 652; *School District v. Stone,* 106 U. S. 183, 187, 1 Sup. Ct. 84, 27 L. Ed. 90; *Town of Coloma v. Eaves,* 92 U. S. 484, 23 L. Ed. 579; *Commissioners v. Beal,* 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; *City of Cairo v. Zane,* 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673.

"Where, by legislative enactment, authority has been given to the officers of a municipality to issue its bonds on some precedent condition, and where the fact may be gathered from the enactment that those officers were invested with power to decide whether or not that condition had been complied with, their recital in the bonds issued by them that it was fulfilled is duly authorized, and it estops the municipality or quasi municipality from proving its falsity to defeat the bonds in the hands of an innocent purchaser.—*Quinlan v. Green County,* 205 U. S. 410, 419, 27 Sup. Ct. 505, 51 L. Ed. 860; *Presidio County v. Noel-Young Bond Co.,* 212 U. S. 58, 65, 29 Sup. Ct. 237, 53 L. Ed. 402; *Stanly County v. Coler,* 190 U. S. 437, 451, 23 Sup. Ct. 811, 47 L. Ed. 1126; *Tulare Irrigation District v. Shepard,* 185 U. S. 1, 23, 22 Sup. Ct. 531, 46 L. Ed. 773. A municipality, a quasi municipality, or a corporation and its officers, who by the apparent legality of their obligations or by recitals of their validity have induced innocent purchasers to invest in them are estopped from denying their legality on the ground that in some of the preliminary proceedings which led to their execution, or in their execution itself, they failed to comply with some law or rule of action relative to the mere time or manner of their procedure, with which they might have lawfully complied, but which they carelessly disregarded.—

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Speer v. Board of Commissioners, 88 Fed. 749, 758, 32 C. C. A. 101, 111; *Clapp v. Otoe County,* 104 Fed. 473, 481, 45 C. C. A. 579, 587; *Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co.,* 51 Fed. 309, 326, 328, 2 C. C. A. 174, 239, 241; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America,* 82 Fed. 124, 137, 27 C. C. A. 73, 86; *Board of Commissioners v. Sherwood,* 64 Fed. 103, 108, 11 C. C. A. 507, 510; *City of Huron v. Second Ward Sav. Bank,* 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534."

It is obvious from the foregoing that every contention urged in support of the legal right of the town to repudiate its obligation on these bonds has been swept aside by the authority of the United States Supreme Court, and subordinate federal tribunals. It is the policy of this court, declared again and again, in the absence, as in this case, of constitutional or statutory inhibition, or contrary holding of its own, to follow the decisions of the federal Supreme Court, and it therefore becomes not only a duty, but our pleasure to now do so. We are not only thus bound by the rule referred to, but we are in full accord in principle with the reasonings and conclusions of the federal decisions in this class of cases. It would be contrary to sound business principles and common honesty to permit municipal or quasi municipal corporations to put out bonds in the names of its general officers, attested by the corporate seal, with formal recital and certificate that they were issued for a known lawful purpose after full compliance with statutory authority and all precedent conditions, to then allow a repudiation and denial of them in the hands of innocent purchasers for value. It is therefore with satisfaction that this court finds itself in position, upon the highest judicial authority of the land, to declare itself opposed to such a policy, as unwise as it is unjust, and one which if persistently pursued could finally end only in general disaster. The question determined is not whether failure to publish the ordinance invalidated the bonds, but rather that the town will not be permitted to

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interpose that defense under the circumstances of this case, however meritorious it might be under conditions where it could properly be urged. A contrary holding would, in effect, nullify the doctrine of *bona fide* holder for value before maturity, which is as applicable to municipal bonds, where the right to issue them exists, as to negotiable instruments generally. This court so held in *City of Cripple Creek v. Adams,* 36 Colo. 320, 85 Pac. 184. That opinion also supports the general principles here announced and is express authority, in harmony with the decisions generally, that bonds of the character of those in suit, in the hands of innocent purchasers for value, are not subject to equities. In that case the court spoke as follows:

> "The Town of Cripple Creek authorized the issuance of these bonds, stated the consideration upon which they were to be issued—that is, in payment of water rights—and stated how the bonds should be authenticated—in other words, by the ordinance pursuant to which the bonds were issued, The Town of Cripple Creek authorized the issuance of the bonds, and left to the board of trustees to determine the existence and sufficiency of the consideration for which the bonds should issue. It further told the public, by this ordinance, when it could put faith in the bonds—that is, when they should be authenticated by the signature of the mayor, clerk and treasurer. The bonds, when issued, were an unconditional promise to pay a certain sum of money at a definite time. The coupons attached thereto were of like effect. The city had the power to issue them. Before the maturity of the bonds, or coupons, they were purchased by plaintiff for a valuable consideration, and without notice or knowledge of the infirmity therein.
>
> "Municipal bonds are clothed with all the attributes of negotiable or commercial paper, pass by delivery or endorsement, and are not subject to equities (where the power to issue them exists) in the hands of holder for value, before due, without notice.—*Dillon's Municipal Corporations,* vol. 1, (3d ed.), § 486.

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"'Such securities are made to raise money by their sale, and this object would be defeated if they were subject to equities (where the power to issue exists) in the hands of *bona fide* holders.'—*Id.*, and authorities there cited.

"This was a sufficient reason for precluding the defense of a failure of consideration as against the bonds. A further reason is the recital of facts in the bonds. The recital in the bonds that they have been issued for a valuable consideration was purely as to a matter of fact, and the recital, 'And it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issue of this bond to render the same lawful and valid have been properly done, happened and performed in regular and due time, form and manner as provided by law,' when applied to the matter of consideration for the bonds, was purely as to a matter of fact, and such recital as to such matter of fact is nowhere contradicted by a public record with notice of which the public is charged.—*Chaffee County v. Potter*, 142 U. S. 355 [35 L. Ed. 1040, 12 Sup. Ct. 216]."

It is therefore apparent that our Court of Appeals was fatally in error when it declared that the town was not estopped by the recital in and the certificate to the bonds, because a precedent condition to their issuance had not been complied with. It would be a strange situation if the town, and its general officers, having full power and authority to comply with precedent conditions, and to determine and declare when that had been done, could issue bonds of apparent legality, with recital and certificate of full compliance with all preliminary requirements, dispose of them to *bona fide* purchasers for value, and then defeat the bonds thus held, by declaring that the things which they could have done, and which it was their duty to do, in order to make the bonds valid, had in fact been totally disregarded. Such a doctrine is not only inequitable, but positively immoral. It would place a premium on misrepresentation and deceit, and at the same time cast a cloud upon securities of

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this class, rendering a sale of them most difficult, which if accomplished at all, could be done only upon terms most favorable to the purchaser.

The decisions of practically all of the state courts, where like questions have been under consideration, are in harmony with the conclusions here reached. Indeed our attention has been called to decisions in but one, the State of Texas, which in any sense can be fairly said to conflict with our views.

The result is that the judgment of the Court of Appeals must be reversed, the cause remanded to it, with directions to affirm the judgment of the district court, and it is so ordered.

Judgment reversed.

Decision *en banc.*

Mr. JUSTICE HILL concurs in the conclusion.

Mr. JUSTICE SCOTT dissents.

CHIEF JUSTICE MUSSER not participating.

JUSTICE SCOTT: I dissent. I am firmly convinced of the soundness, justice and righteousness of the opinion of the state Court of Appeals in this case, 23 Colo. App. 1, and which I make my dissenting opinion herein. It is the first time in the history of this court when it has elected to follow a decision of the Federal Court of Appeals as against the decision of our own Court of Appeals.

The opinion followed by the majority of the court, is in direct conflict with the repeated decisions of the Supreme Court of the United States, covering a period of a hundred years, and it is without precedent in that court.

It is as unsound as it is unrighteous. In the matter considered, it denies all protection of the law to or-

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ganized society, and imposes no duty on investing capital. It makes the tax-paying public defenseless as against the power of public plunder and the fraud of their public officers. The decision followed in this case, is to my mind, the most conspicuous court decision in existence, in the recognition of the rights of dollars as against the rights of man. The principle upon which the decision rests, is one more fitting to have been declared in a darker age, and under a feudal system of government, rather than in this enlightened day, under a government proclaiming universal liberty and equality before the law.

[No. 7992.]

MITCHELL v. CROWL.

1. DAMAGE.—*Evidence as To.* Vendee of lands sues for fraudulent misrepresentations inducing his purchase. The price agreed upon is competent evidence, though not conclusive, of the value of the property if it had been as represented; and is sufficient to carry the case to the jury. (407)

2. VERDICT—*Construction.* Where, taken in connection with the record, the verdict clearly conveys the intention of the jury, it is sufficient. (408)

3. ——*Fraud and Deceit. Execution Against the Body.* Action for Deceit. Verdict for Plaintiff, declaring that "said defendant is also guilty of fraud and willful deceit", entitles plaintiff to the award of an execution against the body of defendant. (408)

Error to El Paso District Court.—Hon. J. W. SHEAFOR, Judge.

Mr. P. M. KISTLER, for plaintiff in error.

MESSRS. CHINN & STRICKLER and MESSRS. VANATTA & DOLPH, for defendant in error.

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Defendant in error as plaintiff, brought suit against plaintiff in error to recover damages on the ground of fraud and deceit practiced by defendant concerning real estate received by the plaintiff from defendant, in exchange for property belonging to the plaintiff. The properties involved, and concerning which the false representations were charged to have been made are mentioned in the record as the Corona Street property in Colorado Springs, and the Holly Ranch in Prowers County. The evidence established that plaintiff was a resident of Cherryvale, Kansas, at which point the trade was made; that he had never seen the properties he received in exchange for his property; that he had previously been in Colorado Springs, at which time defendant showed him a residence in that city on North Nevada Avenue, and represented that the Corona Street house was as good as the North Nevada house, and was in as good condition as that property; that defendant represented the Corona Street property was worth sixty-five hundred dollars, and was rented for $45.00 per month; that in fact it was only rented for $15.00 per month; that it was an old house which had been moved, was very much out of repair, and was not worth to exceed three thousand dollars; that defendant represented it was incumbered by a deed of trust for the sum of twenty-five hundred dollars, drawing interest at 6%, when in fact the rate of interest was 7%. With respect to the ranch the testimony established that plaintiff represented it to be worth fourteen thousand dollars; that from one year's crop of alfalfa grown thereon he had received $23.15 per acre for his half, when in fact he had received but a little over $7.00 per acre; that in fact its actual value was from eight to twelve thousand dollars; that defendant represented it was incumbered in the sum of six thousand dollars, drawing interest at the rate of 6%, when in fact half of that amount drew 8%. It appears from the testimony that the agreed price for the properties, as the basis upon which the trade was consummated, was the respective sums which the defendant

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represented them to be worth. The court instructed the jury to the effect, that if they found for the plaintiff he would be entitled to recover the difference between the value of the property as it actually was on the day of the exchange, and what its market value would have been on that day if it had been as represented by the defendant. The court also instructed the jury that if they returned a verdict for plaintiff, then they should further consider whether or not the defendant in making the representations regarding the property, of which plaintiff complained, was guilty either of fraud or willful deceit, and that if they should find from the testimony that in making such representations the defendant was guilty of either fraud or willful deceit, they should so state in their verdict. The jury rendered a verdict for plaintiff in the sum of $4,250.00, and also stated in their verdict, "we further find that the said defendant is also guilty of fraud and willful deceit in the matter." On this verdict judgment was rendered in favor of plaintiff, for the damages assessed, and also that plaintiff have execution against the body of the defendant, under which he should be committed to the county jail not exceeding six months, provided the judgment was not paid. The defendant brings the case here for review on error, and the foregoing statement is sufficient to present the two questions urged in his behalf, (1) that there was no testimony tending to prove what the properties would have been worth had they been as represented, (2) that the verdict did not justify the court in rendering a body judgment.

Mr. JUSTICE GABBERT delivered the opinion of the court:

In an action by the vendee to recover damages based upon false and fraudulent representations respecting property purchased, the agreed price therefor is competent, but not conclusive, evidence of its value if it had been as represented by the vendor, and is sufficient to submit the case to a jury upon that question.—*Long v. Davis,* 136 Iowa, 734, 114 N. W. 197; *Page v. Parker,* 43

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N. H. 363, 80 Am. Dec. 172; *Houghton v. Carpenter,* 40 Vt. 588; 20 Cyc. 146; 14 A. & E. Ency. 188.

It is urged that because the verdict relating to the fraud and deceit of defendant was in the present tense it is impossible to tell what the jury had in mind on this subject; that they may have referred to his conduct in defending the action or in giving testimony, or in his dealings with the plaintiff subsequent to the trade. In other words the verdict did not contain that statement which the statute requires as a condition precedent to vest the court with authority to award a body execution. The statute (sections 3024, 3025, R. S. 1908) provides in substance, that in actions founded upon tort, if the verdict is in favor of plaintiff, and shall state that in committing the tort complained of, the defendant was guilty of either malice, fraud, or willful deceit, the plaintiff may have an execution against the body of the defendant. The action was in tort. The court instructed the jury that if they found for plaintiff and should further find that defendant was guilty of either fraud or willful deceit, they should so state in their verdict. In these circumstances, it is clear the jury meant by their verdict that defendant was guilty of fraud and willful deceit respecting the representations of which plaintiff complained, in making the false statements he did with respect to the property which plaintiff received. When the language of a verdict in connection with the record, conveys the clear intention of the jury it is sufficient.

The judgment of the District Court is affirmed.

Judgment affirmed.

CHIEF JUSTICE MUSSER and MR. JUSTICE HILL concur.

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[No. 7993.]

ERIKSEN v. WHITESCARVER.

1. ENCUMBRANCE—*Easement.* The right of way for an irrigating ditch is an encumbrance upon the land subject to such easement. (411)

2. VENDOR AND VENDEE—*Covenant to Convey Clear of Encumbrance.* Knowledge on the part of the purchaser of lands, of an easement to which they are subject does not relieve the vendor of his covenant to convey clear of encumbrance, in the absence of evidence that the parties intended that such encumbrance should be excluded from the covenant. The property bargained for being city lots, intended merely for building sites, mere knowledge of the existence of the easement does not manifest such intent on the part of the purchaser. (411, 412)

The effect of such knowledge, were the lands agricultural lands, not decided. (412)

Error to Denver District Court.—Hon. GREELEY W. WHITFORD, Judge.

Messrs. MELVILLE, SACKETT & CALVERT, for plaintiff in eror.

Mr. WARWICK M. DOWNING, for defendant in error.

The parties to this proceeding entered into a written contract for the exchange of real estate, consisting of building lots in the City of Denver. The contract, after reciting that the property of Mrs. Eriksen was incumbered, and that Mrs. Whitescarver was to assume this incumbrance, and also stating what taxes each should assume, provided that Mrs. Whitescarver should convey her lots, (seventeen in number) by good and sufficient warranty deed, and that each should furnish an abstract of title to the property conveyed, and a marketable and merchantable title, and except as specified, each was to convey free and clear of all incumbrances. Mrs.

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Whitescarver furnished an abstract of title to the property she was to convey, which Mrs. Eriksen submitted to her attorneys, who advised her that it exhibited several substantial defects of title. In addition they advised her that a right of way, for an irrigation ditch, crossed the premises, although not shown on the abstract, was probably an incumbrance. Shortly after, at a conference between the parties, Mrs. Eriksen refused to convey her property, or accept a conveyance from Mrs. Whitescarver, because of defects in the title of the property to be conveyed by her, and for the further reasons, that it was incumbered by a right of way for an irrigation ditch. Mrs. Whitescarver, without attempting to correct the alleged defects in her title, or to adjust the ditch right of way, then brought an action for specific performance of the contract. By answer Mrs. Eriksen set up defects in the title of the property of Mrs. Whitescarver, and also the existence of the right of way for the irrigation ditch across them, and for these reasons prayed that she be not required to comply with the contract, and have judgment to the effect that her property be unaffected thereby.

The court found generally in favor of plaintiff, and also that defendant visited the premises to be conveyed by plaintiff prior to the time the contract for exchange was entered into between the parties, and knew that the ditch and right of way, of which defendant complained, and on account of which she refused to carry out the contract, was located on these premises. A decree was then entered requiring the defendant to comply with her contract, and she brings the case here for review on error.

The testimony bearing on the ditch is to the effect that a right of way for this purpose existed over and across seven of the lots, some of which it intersected near the center; that the ditch in places was as much as four feet in depth, and many feet in width at the top; that its capacity was three hundred and fifty inches per

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second; that it was detrimental, not only on account of the ground it occupied, but because through seepage therefrom, water would accumulate in cellars of buildings constructed on the lots, and that it would cost a very considerable sum, variously estimated from one hundred and fifty dollars to several hundred dollars, to pipe it through the alley abutting the lots so as to prevent seepage, and secure the full use of the lots. There is testimony to the effect that the husband of defendant, prior to entering into the contract, visited the lots and perhaps was aware of the existence of the ditch, although at that time water was not running therein. It is doubtful, however, if he knew that the ditch was used for the purpose of carrying water for irrigation. The purpose of securing title to the lots was to erect dwellings thereon.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The right of way for an irrigation ditch is an easement, and constitutes an incumbrance upon land subject to such easement. Plaintiff covenanted to convey her lots free and clear of such an incumbrance. The mere fact that defendant may have known of the existence of the ditch, at the time she signed the contract did not relieve the plaintiff from complying with her covenant respecting the character of the title she agreed to convey. To produce such result there must, in addition to notice, have been at least something in the transaction to show that the parties intended the incumbrance should be excluded from the operation of this covenant. The very purpose of the covenant was protection against defects in the title, and to hold that defendant was thereby only protected against unknown defects would rob the covenant of its value, besides destroying the force of its language. The lots involved are building lots. Defendant intended to erect dwellings thereon. She did not intend to use them for agricultural purposes. Consequently, the existence of the ditch, as the testimony discloses, would interfere with their intended use. Mere

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knowledge then of defendant, of the existence of the right of way for the ditch did not indicate even an intent on her part to treat this incumbrance as excluded from the covenant of plaintiff to convey free and clear of all incumbrance.—*Barlow v. Delaney* (C. C.) 40 Fed. 97; *Sherwood v. Johnson,* 28 Ind. App. 277, 62 N. E. 645; *Eller v. Moore,* 48 App. Div. 403, 63 N. Y. Supp. 88; *Harlow v. Thomas,* 15 Pick. (Mass.) 66; *Flynn v. White Breast C. & M. Co.,* 72 Iowa, 738, 32 N. W. 471; *Quick v. Taylor,* 113 Ind. 540, 16 N. E. 588; *Farrington v. Tourtelott* (C. C.) 39 Fed. 738; *Kellogg v. Malin,* 50 Mo. 496, 11 Am. Rep. 426; *Burk v. Hill,* 48 Ind. 52, 17 Am. Rep. 731.

What might be the rule where lands incumbered by a right of way for an irrigation ditch, and conveyed for agricultural purposes of which the vendee had notice at the time of the conveyance is not involved, and what we have said on the subject of any such easement is confined and limited to the facts before us.

It is apparent that plaintiff could not comply with her covenant to convey her lots to defendant free and clear of incumbrance, at the time she commenced her action, and it was therefore error to decree a specific performance of the contract.

The judgment of the District Court is reversed and the cause remanded with directions to enter a judgment that plaintiff take nothing by her action and that the contract between the parties be annulled.

Judgment reversed and cause remanded with directions.

CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

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[No. 7999.]

STRATTON'S ESTATE v. FINNERTY.

1. APPEAL AND ERROR—*Partial Error.* The award of execution upon the allowance of a claim against a decedent's estate will not suffice to reverse the judgment of allowance. The award of execution stricken out. (414)

2. ——*Substantial Justice—Harmless Error.* Where it appears that further litigation will not produce a result more favorable to the complaining party, immaterial errors will be disregarded. (414)

Error to El Paso District Court.—Hon. J. W. SHEAFOR, Judge.

Messrs. CHINN & STRICKLER, for plaintiff in error.

Messrs. SCHUYLER & SCHUYLER, Mr. EDWARD C. STIMSON, Mr. JULIUS C. GUNTER, Mr. HENRY E. LUTZ, and Mr. PAGE M. BRERETON, for defendant in error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Finnerty filed a claim in the county court of El Paso County against the estate of W. S. Stratton, deceased, in the sum of $32,500.00, for services rendered as a broker in negotiating a sale of notes secured by mortgages, held by and belonging to Stratton, on the Brown Palace Hotel and other property in the City of Denver, and the decree foreclosing these mortgages. A jury in the county court returned a verdict for the estate. From a judgment accordingly the claimant appealed to the District Court, where trial was had with the same result. Claimant then brought the case here for review on error and the judgment was reversed and the cause remanded for a new

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trial: *Finnerty v. Stratton,* 53 Colo. 17, 123 Pac. 667. The re-trial resulted in a verdict and judgment for claimant in the sum of $6,550.00 and the estate has brought the case here for review on error.

The judgment rendered concluded by authorizing the issuance of an execution. The statute inhibits an execution to issue upon a judgment rendered on a claim filed against an estate but the violation of this inhibition does not justify the reversal of the judgment. Counsel for plaintiff in error concede that the attention of the trial court was not called to this matter and we shall therefore amend the judgment by striking the part awarding the execution.

It appears to us the other errors assigned are clearly without merit or were considered and determined adverse to the contention on behalf of the estate when the case was here before. We are satisfied from the record as a whole that claimant is entitled to the sum awarded by the jury, and even if the record is not free from error, it is manifest the estate was not thereby prejudiced, and that to further litigate could not possibly result in a judgment more favorable to the estate than the one rendered.

The judgment of the District Court, as amended, is affirmed.

Judgment affirmed.

Decision *en banc.*

CHIEF JUSTICE MUSSER not participating.

[No. 8012.]

KOIKE v. THE PEOPLE.

CRIMINAL LAW—*Information.* An information under Chapter 164 of the Laws of 1909, for maintaining a private employment agency without a license, must show affirmatively that the unlawful agency

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was maintained in some city or town. Only within cities and towns is the license required. *Langan v. The People*, 32 Colo. 414, distinguished. (417)

Error to Pueblo District Court.—Hon. C. S. ESSEX, Judge.

Mr. M. G. SAUNDERS, for plaintiff in error.

Hon. FRED FARRAR, Attorney General, Mr. FRANK C. WEST, Assistant Attorney General, and Mr. WENDELL STEPHENS, Assistant Attorney General, for The People.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The plaintiff in error was tried and convicted upon an information charging as follows:

"That Charles Koike, on or about the 23rd day of February, A. D. 1912, at the county of Pueblo, State of Colorado, did then and there unlawfully open, operate and maintain a private employment agency for hire, and where a fee was then and there charged the applicant for employment, without first having obtained a license therefor from the Deputy Commission of Labor Statistics."

The only error necessary to consider is the action of the court in overruling the motion of the defendant to quash the information. One of the grounds upon which the motion to quash was based, is that the information does not charge a public offense.

The statute under which the defendant was convicted, in so far as important to consider, is as follows:

"Sec. 1. No person * * * in this State shall open, operate or maintain a private employment agency for hire or where a fee is charged to either applicant for employment or help, without first obtaining a license for the same from the deputy commissioner of labor statistics; such license fee in cities of 25,000 or more population shall be $50.00 per annum; in all cities or towns containing less than 25,000 and more than 5,000 population, a fee of $25.00 per annum; and in all cities or towns under

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5,000 population a fee of $10.00 per annum shall be required.

Every license shall contain a designation of the city, street and number of the building in which the licensed party conducts such employment agency * * * No agency shall print, publish or paint on any sign, window or insert in any newspaper or publication, a name similar to that of the Colorado Free Employment Office. The deputy commissioner of labor shall require with each application for a license a bond in the penal sum of one thousand dollars with two or more sureties, to be approved by the said deputy commissioner, and conditioned that the obligor will not violate any of the duties, terms, conditions, provisions or requirements of this act.

Sec. 3. A private employment agency is defined to be any person, firm or corporation furnishing employment or help, or giving information as to where employment or help may be secured, or who shall display any employment sign or bulletin, or through the medium of any card, circular, pamphlet or newspaper, offer employment or help; and all such persons are subject to the provisions of this act, whether a fee or commission is charged or not. *Provided,* that charitable organizations are not included within the meaning of this act. Session Laws, 1909, p. 366."

It will be seen that the information charged the offense as having been committed "at the county of Pueblo, State of Colorado," while the statute provides for the taking out of a license in cities and towns only, and regulates the license fee upon the basis of the population of such cities or towns.

It is contended by counsel for the plaintiff in error, and conceded by the Attorney General, that under this statute, it is not unlawful to conduct an employment agency in any part of the state outside of cities and towns without a license, and this seems to be the clear intent of the statute.

If then, the operation of an employment agency is an offense when conducted within a city or town only, does

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the information sufficiently state such an offense, in charging the act as "at the county of Pueblo." We think not.

It seems quite clear that if the maintenance of an employment agency at any place outside the corporate limits of a city or town, is not an offense, then the charge that such act was committed at the county of Pueblo, the greater part of the territory of which is not within any city or town, does not sufficiently charge an offense under the statute.

It is said that the case of *Langan et al. v. People,* 32 Colo. 414, 76 Pac. 1048, sustains the claim of the people here. In that case the essence of the offense was the sale of liquor within five miles of a grading camp, and was so charged in the language of the statute.

Here, the gist of the offense is the maintaining of an employment agency in any city or town without a license. It is not an offense when maintained outside of a city or town. The information does not charge that the defendant conducted an employment agency within any city or town, and for such reason states no offense. It is true that in the Langan case, the statute excluded from its operation those who may have a license from an incorporated city or town, and it was there held that it was not necessary to allege that the defendant was not of the exempted class.

So, in the case of the statute under consideration, it is provided that charitable organizations are not included within the meaning of the act, and it is therefore not necessary to allege that the accused is not within that class.

For this reason the judgment must be reversed.

En banc.

WHITE, J., dissents.

HILL, J., not participating.

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[No. 8047.]

RIGGIO v. THE PEOPLE.

Defendant convicted of grand larceny upon evidence not sufficient to raise a respectable suspicion. Judgment reversed.

Error to Las Animas District Court.—Hon. A. WATSON MCHENDRIE, Judge.

Mr. EARL COOLEY, and Mr. D. S. DELAPPE, for plaintiff in error.

Hon. FRED FARRAR, Attorney General, Mr. NORTON MONTGOMERY, Assistant Attorney General; for the People.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The plaintiff in error was charged with and convicted of the larceny of four horses, the property of John Rosenbaugh. Rosenbaugh resided on a ranch about eight miles from the city of Trinidad. The horses were turned into his pasture on the evening of September 29th, 1912. The following morning the gate to the pasture was found to be open, and the horses gone. Rosenbaugh summoned some of his neighbors and the sheriff, and proceeded to make a search.

The party discovered tracks which they believed to be those of the missing horses, and followed these to the town of Aguilar. By means of the tracks and from information given by some person who had seen the horses, they were discovered about eight or ten miles west of Aguilar. When found the horses were hobbled, but not near, or in the possession of any person.

About two miles from where the horses were afterward found, the party met the defendant Riggio, who was traveling in a spring wagon drawn by one horse. These were known to be his own property. The party made in-

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quiry of Riggio, and he said he had seen horses of similar description, at about the point where they were found. The defendant at the time had some cheese in his spring wagon.

There was not the slightest testimony that Riggio was at any time in possession of either of the horses, or near any one of them.

The testimony upon the part of the people does not even create a respectable suspicion of the defendant's guilt. He resides near Trinidad, and shows beyond question, that he went to a house beyond the point where the horses were found, remained all night, procured the cheese and when met by Rosenbaugh, was taking it toward Trinidad, where he afterward disposed of it.

One witness testifies that he saw the horses in possession of two persons, but in no manner attempts to connect the defendant as being one of these.

The defendant at the close of the people's evidence moved for an instructed verdict. This should have been granted.

The judgment is reversed.

MUSSER, C. J., and GARRIGUES, J., concur.

[No. 8050.]

LANE v. LANE.

1. NEGOTIABLE INSTRUMENTS—*Assignment by Delivery.* Under Rev. Stat. § 4512 the owner of a negotiable instrument may pass such title as he has, by mere delivery for value, without endorsement.

And, generally speaking, independent of statute, where the right of no creditor is involved, delivery for value or by way of gift has the same effect. (421)

2. EVIDENCE—*Competency.* Action by the heir to recover from the widow and administratrix of a decedent one half the value of certain

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promissory notes. The widow alleged a parol gift to her by the husband. Certain mortgages whereon was written an assignment to the wife, subscribed by the husband in his lifetime, were held admissible for the purpose of identifying the notes. (422)

In the same case *held* that under subdivision 7 of § 7267 Rev. Stat. as amended by c. 229 of Laws of 1911, the testimony of the widow in the County Court, when cited and examined under Rev. Stat. § 7253 was admissible in her behalf. (422)

Error to Fremont District Court.—Hon. CHARLES A. WILKIN, Judge.

Mr. A. L. TAYLOR, for plaintiff in error.

Mr. D. W. ROSS, for defendant in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

The plaintiff in error, daughter of H. W. Lane, deceased, brought an action in the District Court against the defendant in error, who is the widow of Mr. Lane and the administratrix of his estate.

It was alleged in the complaint that the widow had failed and refused to inventory certain promissory notes, and that her action in that behalf was an effort on her part to convert the same to her own use. It was also alleged that the notes belonged to the estate; that there was no unsettled debts against it and that the plaintiff was entitled to a half interest in the notes as an heir of the deceased. The prayer was that the defendant be required to turn over to plaintiff one half in value of the notes, and if she failed to do so, that plaintiff have a money judgment against the defendant for the one half.

Several defenses were set up in the answer, among which was one denying that H. W. Lane was the owner of the notes at the time of his death, and another that he had assigned and transferred the notes for a valuable consideration to the defendant before his death. The court found that Mr. Lane did not own the notes at the

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time of his death. It appears from the record that the defendant, as administratrix, had been cited to appear before the County Court in which the estate was in process of administration, and had appeared and submitted to an examination touching the notes in controversy under Sec. 7253 Rev. St., '08.

It does not appear from the abstract what the result of the matter was in the County Court. The jurisdiction of the District Court, or the right of the plaintiff to bring the action there, is not raised, and for that reason is not determined. It is conceded that there was no written assignment of the notes, nor assignment thereof by endorsement, but there was evidence to show that the notes were payable to Mr. Lane and were transferred by him by parol assignment and actual delivery to the defendant about two days before his death. This evidence was not contradicted in any way, and it was ample to sustain the finding of the court that the notes were not owned by Mr. Lane at his death. It is provided in sec. 4512 Rev. Stat., that where the holder of such an instrument transfers it for value without endorsement, the transfer vests in the transferee such title as the transferer had. Independent of the statute, it may be said generally when no right of a creditor is involved, that an instrument like a note may be transferred as a donation or for value by delivery without endorsement so as to vest in the transferee such title, at least, as the transferer had. *Conner v. Root,* 11 Colo. 183, 17 Pac. 773; *Gumaer v. Sowers,* 31 Colo. 164, 71 Pac. 1103; *Bromfield Bank v. McKinley,* 53 Colo. 279, 125 Pac. 493; *Davis v. Johnson,* 4 Colo. App. 545, 36 Pac. 887.

It appears from the uncontradicted evidence of one witness that he was called in to see Mr. Lane two days before the latter's death. Mr. Lane was very sick and in bed. Four envelopes, each containing all the papers pertaining to one of four loans made by Mr. Lane, such as the note and mortgage securing it, were given to the witness and he was informed that the sick man wished to

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transfer them to his wife. The witness, for the purpose of making the transfer, wrote on each mortgage an assignment thereof to the wife and Mr. Lane signed this written assignment on each mortgage. This was done to carry out the intent of the sick man to transfer all of the papers to the wife. The assignments were put in evidence. It is claimed that this was error because, as it is said, an assignment of a mortgage does not carry with it the note. This witness gave sufficient testimony to show a parol transfer of the notes and delivery thereof. He was not certain that the particular notes mentioned in the complaint, and which were also at the trial, were the notes that he saw on the day the transfer was made and which were mentioned in the mortgages, but the notes mentioned in the complaint, which were the notes shown the witness, were such notes as were described in the mortgages.

The mortgages, on which were written the assignments, were admissible for the purpose of identifying the notes mentioned in the complaint as the notes that were transferred by the deceased, if for no other purpose. Besides this, the witness testified that Mr. Lane desired to transfer all the papers, notes, mortgages, abstracts and insurance policies to his wife, and the witness wrote the assignments on the mortgages in order, as he said, to carry out that desire, believing that the expressed intent of the sick man would be thus accomplished. The trial was to the court.

Under all these circumstances, there was no error in admitting the mortgages with the assignments thereon. The testimony of the widow in the County Court, when she was cited and examined under sec. 7253 Rev. Stat., written out by the stenographer, was admitted in evidence. It is strenuously urged that this was error. This testimony seems to be of the kind that is expressly made admissible by the seventh subdivision of an act amending sec. 7267 Rev. Stat., '08, found on page 678 Sess. Laws, 1911. Some objection is made in the brief that this testimony was not sufficiently identified by the stenog-

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rapher. That specific objection was not raised at the trial. Besides, had this testimony been excluded, or if it is now disregarded, it would be found of necessity from the evidence of the other witness mentioned above, and which was uncontradicted, that the notes were transferred to Mrs. Lane by delivery before the death of her husband. As we are unable to find any prejudicial error, the judgment is affirmed.

Judgment affirmed.

Mr. JUSTICE GABBERT and Mr. JUSTICE HILL concur.

[No. 8060.]

DUSSART ET AL. v. M. ABDO MERCANTILE COMPANY

1. TAX TITLES—*Assessment—Description.* A custom of the county assessor to describe property by an abbreviation, in the assessment roll, will, in considering the validity of a tax sale based upon such an assessment, be disregarded. Any such custom is vicious and without effect. (425)

2. ——*Void Deed.* A tax deed which by its recitations shows that the land was sold to the county on the first day of the sale is void upon its face. (426)

So a deed not attested by the official seal of the county treasurer where this is required by statute. (426, 427)

3. LIMITATIONS—*Void Deed—Color of Title.* To give color of title the instrument relied upon must be good in point of form, must profess to convey title, and must be properly executed. A treasurer's deed not under his official seal, when this is required by statute, does not amount to color of title. (428)

4. ——*Good Faith.* Color of Title is unavailable when acquired with knowledge of its invalidity. The assessment roll and certificate of sale described the property as situate in a town which had no existence. One of the purchasers was an attorney. *Held* impossible to conceive of good faith, in reliance upon a deed, based upon such certificate, and assuming to convey other and different property. (430)

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5. TRIAL—*Continuance—Surprise.*—Surprise in the testimony produced for defendant, alleged during the trial, as ground of a continuance, presents a question which is for the discretion of the trial court. (426)

Error to Las Animas District Court.—Hon. A. WATSON MCHENDRIE, Judge.

Messrs. MCGLASHAN & GOW, and Mr. W. G. HINES, for plaintiffs in error.

Messrs. MCCHESNEY & MCCHESNEY, for defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an action to cancel a tax deed and to quiet title in the plaintiffs below, to the premises involved. Louis Dussart died on the 4th day of July, 1896, intestate, and at the time of his death was the owner and in possession of Lot 9, Block 10, in Romeroe's addition to the town of Aguilar in Las Animas county.

He left as his heirs, a wife and six children, all of whom were the plaintiffs below in this case. The defendant claims under a tax deed dated January 29th, 1902, based upon a sale of the premises to the county on the 23d day of March, 1896, for taxes due for the year 1894; recorded February 24th, 1902; and under the seven years' statute of limitation, as being in open, notorious, continuous and actual possession of the lots involved for a period of more than seven years prior to the commencement of this action, under claim and color of title made in good faith, and the payment of all the subsequent taxes legally assessed against said lot.

The cause was tried partially upon an agreed statement of facts, in which it is agreed in addition to what has been said; that three of the plaintiffs were at the time of the execution of the tax deed, minors, and did not attain their majority in time to come within the statute of limitations so pleaded; that in 1894, the property was

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assessed at the value of $5.00 and the tax levied was twelve cents; that the certificate based upon which the deed was executed, described the premises as Lot 9, Block 10 of the town or city of Romeroe's; that no valid affidavit of publishing and posting the notice of tax sale was filed with the county clerk and treasurer; that the said tax certificate was assigned by the county treasurer to A. I. Lindsey and Fred Rustedt; and that the tax deed described the property as Lot 9, Block 10 in Romeroe's addition to Aguilar, Las Animas county, Colorado; that the property was afterward by mesne conveyances, conveyed to the defendant in error.

It is further stipulated that the said tax deed is void on its face, in that the property therein purporting to be conveyed was sold to the county of Las Animas on the first day of the treasurer's sale, and that said deed is not attested by the official seal of the county treasurer of Las Animas county; and that all subsequent taxes were paid by the defendant and its grantors when due.

It was admitted during the trial that it was the custom of the county assessor in the year 1894, to assess the property in Romeroe's addition to the town of Aguilar as being a certain lot and block, Romeroe's, and that it was intended thereby to mean Romeroe's addition to Aguilar. But the plaintiff's rights are not controlled by a custom of county officials. They are entitled to their rights under the law.

The court found that the tax deed was void upon its face and that the defendant and its predecessors claiming the title under the tax deed have been in the actual, open and notorious possession of said lot, under claim and color of title, made in good faith, and have paid all taxes legally assessed and levied thereon for a period of seven years immediately preceding the commencement of the action. That the seven year statute of limitation cannot and does not apply to the three plaintiffs, who were minors at the time, and the judgment in so far as these three of the plaintiffs is concerned, cancelled and annulled said tax deed and quieted title in a one-twelfth

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interest in said premises in and to each of the three defendant minors, and adjudged the defendant to be the owner in fee simple of the remaining three-fourths interest, and quieted title in the defendant for such interest in the premises. This judgment is before us for review.

While there are many apparent valid objections to the validity of the tax deed, we will consider only the following:

(a) That the deed is not attested by the official seal of the county treasurer of Las Animas county.

(b) That the property was assessed and described in the certificate of tax sale as follows: Lot 9, Block 10, Romeroe's, while in the deed the premises are described as Lot 9 Block 10 in Romeroe's addition to the Town of Aguilar, etc., which latter is the correct description of the premises.

Upon the hearing A. I. Lindsey, one of the grantees, of the deed, testified for the defendant and to the effect that he erected a building on the premises in the year 1903. Counsel for plaintiff contended that this testimony was a surprise and for such reason moved the court for a continuance to permit them to prove that this building was not erected, and that Lindsey did not take possession of the premises until 1905, which, if true, would take the case out of the seven year statute of limitations.

This motion was overruled, and is assigned by the plaintiffs as one of the errors in the case. It would seem to be well within the discretion of the court to overrule that motion, and as presented here we cannot hold it to be error.

The deed upon its face shows that the property was sold to the county on the first day of the treasurer's sale. Under the repeated decisions of this court as well as by the admission of parties, this deed was clearly void upon its face for such reason alone.

It is also agreed that the deed is void upon its face for the additional reason that it is not attested by the county treasurer's official seal. The deed in question was issued under a statute, sec. 184, Laws of 1901, requiring

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its execution by the treasurer in his official capacity, and attestation by his official seal and not "official or private," as required under the former statute.

In *Empire Co. v. Bender,* 49 Colo. 522, 113 Pac. 494, it was said: "Under the statute in force at the time of the execution of such an instrument, it was a prerequisite that the deed should be signed by the treasurer in his official capacity, and attested by his official or private seal, and acknowledged, before some officer authorized to take acknowledgments of deeds, and when substantially thus executed and recorded in the proper records of title to real estate, it vested all the right, title, interest and estate of the former owner in and to the lands conveyed. Until the deed was thus executed, namely: signed by the treasurer in his official capacity, attested by his private or official seal, and acknowledged, it was no deed. Mills' Ann. Stats, secs. 3901 and 3902." In that case, *Sayer v. Sage,* 47 Colo. 559, 108 Pac. 160, was quoted with approval wherein it was said:

"The treasurer, in executing such deed, acts under a naked statutory power, and in order that it shall be valid, it must comply substantially with the provisions of the statute prescribing its form. That it must be attested by the official or private seal of the treasurer is a positive requirement of the statute, and is as necessary to its validity as any other. Without one of the other of the seals specified, it is void."

The law of 1901 required attestation by the official seal alone, and in the absence of this or of any seal at all, the deed in controversy was void upon its face for that reason alone.

It will be seen that the tax deed relied on in this case under authority of *Empire Co. v. Bender, supra,* by reason of the absence of the seal of the county treasurer, *was no deed at all.* It does not come within the rule of *De Foresta v. Gast,* 20 Colo. 307, 38 Pac. 244, and authorities cited as resting on that case. It is not regularly executed as provided by the statute. The last case cited, as does *Sayre v. Sage, supra,* holds that the attachment

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of the seal is vital to the validity of a tax deed for the reason that it is vital to the manner and form of the execution of the instrument. If therefore it is no deed at all, it follows that such an instrument cannot give color of title.

In an exhaustive review of the authorities it was held in the case of *Matthews v. Blake,* 16 Wyo. 116, 92 Pac. 242, quoting Black on Tax Titles:

"Where the statute directs the execution of a deed by a public officer, and requires it to be executed in a particular manner and to be witnessed or acknowledged before a particular officer, the witnessing or acknowledging of the deed in that manner is a part of its execution, and without such witnessing or acknowledgment is void upon its face. The rule is stated in *Black on Tax Titles,* § 208, as follows: 'A rule of primary importance is that the execution of a tax deed must conform strictly to the statute; that is, any directions which the law may give in regard to its signature, seal, witnesses, or acknowledgment, must be duly complied with, or the conveyance will be invalidated. Thus, if the act requires that tax deeds shall be authenticated by the addition of the seal of the county, and this be omitted, the deed will be void; nor will it even be admissible to show color of title under the special limitation of the revenue act.'"

It may be stated as a general and well established rule of law, that in order to give color of title, the instrument of conveyance must at least be good in point of form, profess to convey the title, and be properly and duly executed.

Under a statute requiring the seal of the county to be attached, as in this state, it was expressly held in *Sutton v. Stone,* 4 Neb. 319, that if the seal of the county be omitted in its authentication, the deed is not only void, but that it is not admissable even to show color of title. In *Redfield v. Parks,* 132 U. S. 239, 33 L. Ed. 327, 10 Sup. Ct. 83, a case where a tax deed recited the sale of being on a day not authorized by law, the deed was held not admissible in evidence to support adverse possession under a statute of limitations. *Armstrong v. Hufty,* 156 Ind. 606,

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55 N. E. 443, 60 N. E. 1080. In *Day v. Day,* 59 Miss. 318, the sole question was the omission of the seal of the county treasurer, and it was there held that the instrument was not a deed, and therefore not admissible in evidence for any purpose.

The reason for the rule is well stated in *Keller v. Hawk,* 19 Okla. 407, 91 Pac. 778, as follows:

"We believe that the legislature did not intend that time should breathe life and force into an instrument from the face of which it could be seen that it was absolutely void. The law was intended to protect purchasers at tax sales and their grantees from hidden defects in the proceedings, and not from those which the tax deed shows upon its face, and which under the law, persons dealing with the title are bound to know."

We must hold therefore, that the deed in this case by reason of the absence of the seal of the county treasurer was not *prima facie* evidence of title, and in the language of *Empire Co. v. Bender, supra,* it was no deed.

The clearest definition of the term "claim and color of title in good faith," we have been able to find, is that given in *Irving v. Brownell,* 11 Ill. 403, where it is said:

"By the words 'claim and color of title made in good faith,' must, therefore, be understood such a title as, tested by itself, would appear to be good—not a paramount title, capable of resisting all others, but such an one as would authorize the recovery of the land when unattacked, as no better title was shown; that is, a *prima facie* title. Such a title, connected with seven years actual possession and payment of taxes, becomes invincible. The auditor's deed offered in evidence in this case, as has already been shown, was not such a title, as, unaccompanied with other proof, it did not afford *prima facie* evidence of title, and it was not, therefore, admissible in evidence, for the purpose of showing claim and color of title under the act of 1839."

But this claim under "color of title," must be made in good faith, and is not available where the title is accepted with knowledge of its invalidity.

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In *Irving v. Brownell, supra,* speaking upon this point the court said:

"We are bound to give these words some meaning, and they will have none if the same construction is to be put upon the act as if they were not in it. It is manifest that the legislature only intended to protect those who had been in possession of land and paying taxes upon it under the belief that they had a good title * * * If he knew that he was not acquiring such a title, or if the circumstances should be such that a reasonable man might know that the title he was obtaining was wholly defective, then it would not be a title acquired in good faith, and consequently, not entitled to the protection of the act of 1839."

The certificate of sale to the county purchased by Lindsey and Rustedt, and upon which the deed was issued, described the premises therein alleged to be sold, as Lot 9, Block 10, town or city of Romeroe's. The property was so assessed and described upon the tax roll. This appeared on the face of the certificate. It is not claimed that there is any such city or town in Las Animas county as Romeroe's. The deed described the premises as being in Romeroe's addition to the town of Aguilar. The description upon the tax rolls and in the certificate of sale may have applied equally as well to the town of Trinidad as Aguilar. The description in the certificate and upon the rolls was of no existing premises at all. This was apparent on the face of the certificate and the purchasers were in this case presumed to know the law, and the fact that there was no such town or city as Romeroe's must have been apparent. Beside, it appears that one of the purchasers was a lawyer. Reliance in good faith upon the purchase of such a certificate as entitling the purchasers to a deed for premises not therein described is inconceivable.

One who takes a conveyance of a tax title can claim no benefit from it if he had actual knowledge of facts which render it invalid or if the records show on their face fatal defects or irregularities. 37 Cyc. 1485, Am. & Eng. Enc. Vol. 1, 868, and authorities cited. In *Bowmand*

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v. Wetting, 39 Ill. 416, the holder of a certificate of tax sale obtained a tax deed prior to the expiration of the two years required by the statute and the court said:

"The question is, can a party holding such certificate, when he accepts a deed to which he knows he is not entitled under the law, be considered as acquiring the color of title which such deed, if he was entitled to it, would give him, in good faith? We have no hesitancy in answering this question in the negative. The deed was made and accepted in fraud of the law. The appellant knew, when he accepted this deed, that he was not entitled to it, and therefore, cannot use it as color of title made in good faith."

In *Silford v. Stratton,* 54 Colo. 248, 130 Pac. 327, this court quoted with approval the following language from *Hardin v. Governour,* 69 Ill. 140:

"But color and claim may be made in good faith or in bad faith. The good or bad faith is not a result of color of claim. The faith, whether good or bad, depends upon the purpose with which the deed is obtained, and the reliance placed upon the claim and the color. A party receiving color of title, knowing it to be worthless, or in fraud of the owner's rights, although he holds the color and asserts the claim, cannot render it availing, because of the want of good faith."

The facts in this case force the conclusion that there was an absence of that good faith required by the statute.

The judgment is reversed.

MUSSER, C. J., and GARRIGUES, J., concur.

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[No. 8100.]

TOWN OF SUGAR CITY ET AL. v. BOARD OF COMMISSIONERS OF THE COUNTY OF CROWLEY.

1. ELECTIONS—*Contest—Statement of Contest—Amendment.* The provision of Rev. Stat. § 2312 that where the reception of illegal votes is the ground of contest a list of the persons alleged to have voted illegally must be set forth in the statement of contest, is mandatory, and must be strictly construed. A defect in this respect cannot be amended. (435)

The provisions of the Code of Civil Procedure have no application. (437)

2. SPECIAL PROCEEDINGS—*Amendment.* Where in a special proceeding the statute makes no provision for amendments, those of a substantial character are not to be allowed. (438)

3. COUNTY SEATS—*Location or Removal—Election.* The Act of February 11th, A. D. 1881, (Laws 1881, 103, Rev. Stat. § 1171-1176) was intended to establish a uniform procedure regulating all elections concerning county seats. It applies to the conduct of an election for the permanent location of a county seat. (442, 443)

All former legislation upon the subject, inconsistent with its provisions is impliedly repealed. (443)

4. ——*Qualification of Voters.* In view of § 2, art. XIV, and § 1 of art. VII of the constitution, whether the same rule as to residence should be adopted in elections for the location of a county seat, as in one for the removal of a county seat is a question for the legislature. The provisions of the act of 1881, as to this matter are within the legislative power. (446, 447)

5. STATUTES—*Repeal by Implication.* A statute repeals by implication all prior legislation inconsistent with its provisions, even though the latter enactment contains no repealing clause. (443)

6. ——*Construction—The Title of an Act*, is not to be referred to where the provisions of the Act are expressed in clear and unambiguous terms. (445)

7. ——*Title—Sufficiency.* Where it is clear that no member of the legislature could have been misled by the words used as the title to an enactment, nor any citizen of ordinary prudence led astray, the act will be sustained. (448)

The title of the act of February 11, 1881, "An act to regulate elections for the removal of county seats", *held* broad enough to in-

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clude an election for the permanent location of the county seat, which had been provisionally appointed by the act organizing the county.

Error to Crowley District Court.—Hon. J. E. RIZER, Judge.

Messrs. THOMAS & THOMAS, for plaintiffs in error.

Mr. H. A. HICKS, Mr. I. H. STANLEY, Mr. PERRY BEHYMER, and Mr. CHARLES ROACH, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

The General Assembley created the County of Crowley in 1911 and temporarily established its county seat at the town of Ordway, and provided that the county seat should remain there until a permanent county seat was selected and established as provided by law.

The Board of County Commissioners called and caused to be held, at a general election for state and county officers on November 5th, 1912, a special election for the purpose of permanently locating the county seat. Acting under the law of 1881, separate registers and judges of this election were appointed, and separate ballot boxes therefor provided. The judges were required, and actually did, permit to be registered, and to vote upon that question, only such persons as were by the terms of the Act of 1881 entitled to vote, namely, such electors as had resided within the State of Colorado one year, in the county six months, and in the precinct ninety days.

As a result of the election, the board of canvassers, on the 8th day of November, 1912, returned that the town of Ordway had received a majority of twenty-seven of all votes cast upon that question. On the 18th day of November next thereafter, the tenth day after the official canvass, plaintiffs in error filed in the District Court their statement of contest, thereby undertaking to

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overturn such election. On the 27th day of that month the defendant in error filed its answer, consisting of five separate defenses and pleas, and one counterclaim. On the 16th of December following, the answer of defendants in error having raised the sufficiency of such statement of contest, because of its failure to set forth a list of names of alleged illegal voters, plaintiffs in error asked leave to amend, and tendered, and requested to have made a part of their original contest statement, a list of such alleged illegal voters, which leave the court denied. It is to be noted that the filing of the application to amend was three weeks after the filing of the answer of defendant in error, and lacked but two days of being a full month after the filing of the original statement of contest.

There are two main questions in this case, incidentally involving some minor ones: First. Should plaintiffs in error have been allowed to file an amendment to the third paragraph of the complaint, by inserting therein or adding thereto the names of those persons who it is claimed were illegal voters? Second. Was the election to locate the county seat held under the provisions of the proper statute, or was the election void, because of the residential qualifications required to entitle persons to vote upon that question?

The Act providing for election contests of this character is not only special, but furnishes a complete system of procedure within itself, summary in its nature. Sections 2308-2319, R. S. 1908. Under the plain terms of section 2308 and those immediately following, it is manifest that the contestors were without right to amend their statement of contest by supplying the very thing which was essential in the first instance to state a ground of contest and give the court jurisdiction. The allegation in the statement of contest to which the amendment was offered reads:

> "Third.—That sufficient illegal votes were received, and counted, for the Town of Ordway, as the

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location of the permanent county seat of the county of Crowley, at said election, in each of the several voting precincts of the said County of Crowley, to change the result of said election."

Section 2312, R. S. 1908, reads in part as follows:

"When the reception of illegal or the rejection of legal votes is alleged as the cause of the contest, a list of the number of persons who so voted, or offered to vote, shall be set forth in the statement of contestor."

This provision is mandatory and must be strictly construed. The language of the statute in this particular, as well as in all other fundamental features, is not subject to amendment under the liberal provisions of the code of civil procedure. In *Schwartz v. County Court,* 14 Colo. page 44, 23 Pac. 84, it was held that in order to give the court jurisdiction the contest statement must contain the list required by section 2312, and the opinion therein contains the following:

"The proceedings upon an election contest before the county judge, under the statute, are special and summary in their nature; and it is a general rule that a strict observance of the statute, so far as regards the steps necessary to give jurisdiction, must be required in such cases. The act under which these contests were instituted not having been complied with in the particular mentioned, the statements filed as the basis of the proceedings are radically defective. Sedg. St. & Const. Law, 299; *Dorsey v. Barry,* 24 Cal. 449; *Casgrave v. Howland,* id. 457; *Norwood v. Kenfield, supra* [30 Colo. 393]; *Loomis v. Jackson,* 6 W. Va. 613; *Buckley v. Lowry,* 2 Mich. 418.

"The act is not only special in character, but it furnishes a complete system of procedure within itself. It requires that such contests shall be tried and determined by the county judge of the county in which the contest arises. It provides for a written statement as the basis of the proceedings, and designates what it shall contain, and the officer with whom it shall be filed. It designates the officer by whom the summons shall be issued, and provides the time and

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manner of making up the issues. Provision is also made for fixing the time of trial, and for the form of judgment to be entered, etc. As we have seen, the jurisdiction of the court, under such a statute, depends entirely upon the terms of the act, and consequently, before contestors can invoke such jurisdiction, facts must be stated by them which bring the cases within the purview of the act. In these statements, while the board of registration is charged with fraudulently permitting the names of those not entitled to vote to be registered, the *gravamen* of complaint in each case is that sufficient illegal votes were received and counted for the contestee to change the result of the election; and, unless this can be maintained as a cause of contest, contestors must fail; and yet no attempt has been made to comply with that portion of the act requiring a list of the number of persons who so voted, with the precinct or ward where such votes were cast, to be set forth in the statement. It is reasonable to conclude that the legislature in enacting this requirement had in view the fact that by previous legislation the utmost care had been exercised to provide for the casting of the ballots and the integrity of the count; and it is certainly not unreasonable to require those who desire to contest the right of a person to an office to which he has been declared duly elected by the tribunal provided by law to determine that question, to state with reasonable certainty and precision the cause upon which they rely to overthrow such result. We cannot say that the provision of the statute of 1885, under consideration, is unreasonable, and, if it were, relief must be looked for from the legislature, and not from the courts.

"The court below should have sustained the pleas to its jurisdiction based upon the failure to include in the statements the lists required by the statute. *Fairibault v. Hulett,* 10 Minn. 38 (Gil. 15); High Extr. Rem., § 781; *Keller v. Chapman,* 34 Cal. 635; *Garretson v. County of Santa Barbara,* 61 Cal. 54; *Quimbo Oppo v. People,* 20 N. Y. 531."

Under this rule, upon principle and reason, obviously a contestor should not be permitted to make such an

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amendment, long after the time in which a contest might be instituted, the effect of which would be to extend the time allowed by statute within which such an action can be begun, a thing which the legislature could never have contemplated, since the proceedings are special and summary. In the case of *Kindell v. LaBert,* 23 Colo. 385, 48 Pac., 641, 58 Am. St. 234, it is definitely ruled that amendments such as the one here proposed are not permissible under our statute. Speaking to this point in that case this court said:

> "In McCrary on Elections, § 396, it is said that an amendment in proper cases should be allowed. Where it is proper, it should be seasonably applied for and under sufficient showing. Ibid. secs. 407, 408. And if it work a continuance or considerable delay, it should not be granted.
>
> "Upon the other hand, where, as in Colorado, the procedure is governed by a special act which does not provide for amendments, and in which the proceedings are not assimilated to some practice that does so provide, it has been expressly held that it was beyond the power of the court to permit amendments to be made. *Ford v. Wright,* 13 Minn. 518, (Gil. 480); *Bull v. Southwick,* 2 N. M. 321, 362, *et seq.; Vigil v. Pradt,* 4 N. M. 375, Johns, 20 Pac. 795; 6 Am. & Eng. Ency. of Law, 407.
>
> "In the case of *Schwartz v. County Court,* 14 Colo. 44, 23 Pac. 84, because not necessary to the determination of that case, this court expressly declined to decide the point. But as it held that the act furnished a complete system of procedure within itself, this case gives countenance to the doctrine that, in special proceedings, the right to amend depends upon the provisions of the act itself. Additional recognition is found in the decisions of this court under the eminent domain act, which prescribes a complete system of procedure for the taking or damaging of private property. Under that act it has been decided that the code provisions 'on the subject of amendments to pleadings are inapplicable.' *Knoth v. Barclay,* 8 Colo. 300, 6 Pac. 924; *Tripp v.*

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Overocker, 7 Colo. 72, 1 Pac. 695; *Colo. Cent. R. Co. v. Allen,* 13 Colo. 229, 242 [22 Pac. 605].

"Upon principle, and in the light of these authorities, we are of opinion that where the statute itself provides for amendments, but does not define their scope, those relating to formal matters, or which are made for the purpose of perfecting and completing causes of contest comprehended within the original statement, may, upon a proper showing and if applied for within a reasonable time, be permitted; but in the absence of such a permissive statute, not even amendments of this nature can be made, and, unless there is a provision expressly so providing, no new cause of action or contest can be set up by way of amendment."

There is nothing whatever in our contest statute providing for amendments of any sort. Since there is no such provision, clearly, under the rule as announced in the *LeBert* case, *supra,* no amendments, certainly none of substance, should be allowed. This court clearly recognizes the rule that the right to amend in special proceedings is purely statutory, and where the statute does not specifically so provide amendments of a substantial nature cannot be made. Moreover, in view of the fact that the amendment was not proposed until some three weeks after answer filed, and practically one month after the contest was begun, even were the holding otherwise as to the right to amend, still in the instant case it certainly cannot be said that there was an abuse of discretion in refusing to allow it.

Was the election held under the proper statute? The determination of this question depends upon a consideration of various constitutional provisions and statutes relating thereto. At the time of the adoption of the constitution the following territorial statutes upon the subject under consideration were in force:

"It is further provided that the people may locate permanently the county seat in any part of the county, by a vote of the majority of the legal voters

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in each county according to law. § 1165, R. S. 1908; Session Laws 1861, page 57.

"Whenever any county shall be organized hereafter, the qualified voters thereof are hereby empowered to select the place of their county seat by a vote at the first election held in the county for the choice of county officers. For that purpose each voter may designate in his ballot the place of his choice for the county seat; and when the votes are canvassed the place having a majority of all the votes polled shall be the county seat; * * * § 1166, R. S. 1908; Session Laws 1861, page 151."

These sections contain the law then in existence for the locating of county seats. The legislature of 1861 also passed an act on the question of removing or changing a county seat, which reads as follows:

"Whenever the legal voters of any county are desirous of changing their county seat, at any time, upon petition being presented to the county commissioners, signed by a majority of them, to tbe ascertained by said commissioners, it shall be the duty of such commissioners to require the sheriff in giving the notice for the next county election, to notify said voters to designate upon their ballots, at said election, the place of their choice; and if upon canvassing the votes polled or given it shall appear that any one place has a majority of all the votes polled, such place shall be the county seat, * * * " § 42, ch. XX, R. S. 1868.

Section 2 of article 14 of the constitution of the state, under the title "Counties", provides as follows:

"The general assembly shall have no power to remove the county seat of any county, but the removal of county seats shall be provided for by general law, and no county seat shall be removed unless a majority of the qualified electors of the county, voting on the proposition at a general election, vote therefor; and no such proposition shall be submitted oftener than once in four years, and no person shall vote on such proposition who shall not have resided in the county six months and in the election precinct

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ninety days next preceding such election."

Section 25 of article 5 provides, among other things:

"The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * locating or changing county seats;"

In 1881 the state legislature passed the following law: "An Act to Regulate Elections for the Removal of County Seats. * * *

"Section 1. That whenever an election shall be ordered by the board of county commissioners of any county to ascertain the sense of the legal voters of such county upon the question of removal or location of the county seat of such county, it shall be the duty of such board of county commissioners to appoint special judges and registers of such elections, and to provide a special ballot box in each voting precinct, in which shall be deposited all the ballots cast at such election in such precinct on the question of location or removal of the county seat.

"Sec. 2. It shall be the duty of the judges and registers so appointed to make a special registration of the voters of each precinct, who have resided in the county at least six months, and in such precinct at least ninety days, prior to the day designated for holding such election, which day shall be the day designated by law for holding a general election and no other.

"Sec. 3. The election shall be held at the same places at which the general election is ordered to be held, but the vote for or against removal or location of the county seat shall be by special ballot, separate and distinct from the general ticket voted at said election, which ballot shall be deposited in the special ballot box, provided for in section 1st (one) of this act, and no vote shall be counted for or against said removal or location which is not deposited in such special ballot box as herein provided.

"Sec. 4. No county seat shall be removed until the expiration of the thirty days after the canvass of the votes had by the county canvassers upon the question of location or removal, nor until the board of county commissioners of such county shall have

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made and entered of record on their journal an order directing such removal, which order the said board shall make within thirty (30) days after the county canvass is completed, unless enjoined or restrained from so doing by an order of the district court of said county or the judge thereof, or by the supreme court.

"Sec. 5. All laws now in force relating to elections shall apply to elections held upon the question of removal or location of county seats, except that the question of location of such county seat shall be contested in the district court of said county in the first instance, but may be removed to the district court of any other county under the provisions of the code relating to change of the place of trial, and shall be also subject to appeal or writ of error to the supreme court: *Provided,* that not less than two-thirds of all the legal votes cast shall be necessary to effect the removal of the county seat of any county in this state.

"Sec. 6. All laws governing contests of elections shall be held applicable to contests of county seat elections, except that the board of county commissioners of the county shall in all cases be the contestee, and that the contest shall be conducted in the district court of the proper county. Such district court or the judge thereof in vacation may appoint a referee to take testimony in relation to the grounds of contest alleged by the contestor, which referee may sit to take evidence in any precinct of his county."

Session Laws, 1881, page 103.

The contention on the part of plaintiffs in error, contestors, is that every legal voter, that is, every elector of Crowley County qualified to vote at a general election, was entitled to vote upon the question of locating the county seat, under the provisions of the territorial statutes, and that since the election was restricted or limited to that portion of the legal or qualified voters who had resided in the county six months and in the precinct ninety days, the constitutional and statutory rights of qualified electors were denied, and the integrity of the

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election so affected as to render it illegal and void. On the other hand, it is contended that by the law of 1881 it was undertaken to legislate fully upon the subject, not only of the removal, but of the location of county seats, and that it provides a complete system for the regulation of elections upon both propositions, and that all prior conflicting legislative enactments were thereby repealed by implication.

At various times since the enactment of the law of 1881 there has been new legislation amendatory of the act of 1861, upon the question of removing or changing a county seat, heretofore quoted in this opinion and contained in the Revised Statutes of 1868 as paragraph 42, Chapter XX, which relates solely to the change of county seats. This occurred in 1885, again in 1891, and also in 1911. But none of these subsequent enactments in the least change or modify the law of 1881, so far as it relates to the permanent location of county seats. Now, if this law provides for the regulation of elections both for the change and for the permanent location of county seats, the election was properly held, but if the territorial statute, providing for the manner of the permanent location of county seats, is in force, at which election all electors qualified to vote at general elections can vote, then the election was improperly conducted and the result cannot be upheld.

We are thoroughly satisfied that the legislature intended by the provisions of this act to provide for the conduct of elections both as to the permanent location and the removal of county seats. The constitutional provisions quoted are still in force. By section 2 of article 14 of the constitution the people withheld authority from the general assembly to remove county seats, and precluded any one from voting on that question who had not resided in the county six months, and the precinct ninety days. By section 25 of article 5 the people prohibited the general assembly from passing any local or special law affecting, among other things, the location or change of county seats. Obviously it was pursuant

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to these constitutional amendments that the general assembly adopted the act of 1881. It is general in its terms, is not open to the objection of being either local or special, and is its first expression upon the subject of location and removal of county seats, after the limitations and inhibitions fixed by the constitution. It was the plain intention of the legislature to establish by this act a uniform procedure regulating all elections concerning county seats, in harmony with constitutional provisions. The act is essentially different in many respects from all former legislation upon this subject. It requires the appointment of special judges and registers of election and the use of separate ballot boxes; provides for six months' residence in the county, and ninety days' residence in the precinct, as a qualification to vote upon such question; and contains new and additional matter in that it, for the first time, provides for contest of election upon the question of either removal or location of county seats, and designates the court which shall have jurisdiction to hear and determine such contests. Since the act is inconsistent with and repugnant to former legislation upon this subject, although it contains no repealing clause, it is well settled that, notwithstanding such omission, so much of former legislation as is in conflict with the later provisions is impliedly repealed.

In support of this proposition we quote from *Sedgwick,* in his work upon the construction of statutory and constitutional law, under the heading *"Repeals by Implication",* page 104, as follows:

> "But, on the other hand, it is equally well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it do not do so in terms; and even if the subsequent statute be not repugnant, in all its provisions, to a prior one, yet if the later statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act."

And again at the same page:

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"It has been repeatedly declared that every statute is, by implication, a repeal of all prior statutes, so far as it is contrary and repugnant thereto, and that without any repealing clause."

Our own court, in *Edwards v. D. & R. G. R. Co.,* 13 Colo. 59, 21 Pac. 1011, spoke upon the same subject as follows:

"The fact that the latter statute does not in words refer to the earlier, but on the contrary purports to amend a different chapter, does not take away the repugnancy or alter the consequences arising therefrom. It is not absolutely necessary under the constitution that a repealing statute shall, either in its title or body, mention the statute repealed. Cooley, Const. Lim. 183."

In *District of Columbia v. Hutton,* 143 U. S. 18, 36 L. Ed. 60, 12 Sup. Ct. 369, it is said:

"We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally sound and well settled which we think applies to this case. Stated in the language of this court in *United States v. Tynen,* 11 Wall. 88, 92, it is this: 'When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.'"

The above case is cited with approval and followed in a later case, *Henrietta Mining & Milling Co. v. Gardner,* 173 U. S. 123, 43 L. Ed. 637, 19 Sup. Ct. 327, in which is found the following statement quoted from *Henderson Tobacco Company,* 11 Wall. 657, 20 L. Ed. 235.

"Statutes are indeed sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule

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when the provisions of the latter act are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing manifests a clear intent to abolish the old law."

The supreme court of Michigan, in *Maynard v. Wesselius,* 117 Mich. 477, 76 N. W. 69, has stated the same rule in the following language; quoting from *State v. Mayor, etc.,* 40 N. J. L. 257:

"'Every statute must be considered according to what appears to have been the intention of the legislature, and, even though two statutes relating to the same subject-matter are not in terms repugnant or inconsistent, if the latter statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the original act.' This statement is only the reiteration of the general rule laid down by text writers and the courts generally."

The words location and removal are not only used disjunctively throughout the act, but are employed in such a manner as to indicate conclusively that the legislature had clearly in mind both the subject of removal, and the subject of location of county seats. While it may be admitted that the title of a legislative act is often taken into consideration by the courts as an aid to the interpretation thereof, it is elementary that where there is no doubt as to the purpose of the act there is no room for interpretation, and as the body of this act is expressed in clear and unambiguous terms, there is no occasion to resort to the title to aid in its interpretation. Had the act been so worded as to render it in the least doubtful or inconsistent, or if ambiguity could be discovered in it, then resort might be had to its title to afford aid in determining its meaning. But since the real object of the statute is definite and certain, we need not go beyond the body of the act to seek information as to the legislative intent.

Upon the proposition that in aid of the interpretation of the statute its title should be resorted to only in

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cases of uncertainty or ambiguity in the body of the act itself, numerous authorities might be cited, from which we select the following:

> "'The title is no part of an act and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous. (Citing cases) The ambiguity must be in the context and not in the title to render the latter of any avail.' *United States v. Oregon &c. Railroad,* 164 U. S. 526, 541. [41 L. Ed. 541, 17 Sup. Ct. 165]" *Cornell v. Coyne,* 192 U. S. 418, 430, [48 L. Ed. 504, 24 Sup. Ct. 383].
>
> "In determining the meaning of a statute, courts will endeavor to ascertain the intention of the legislature in framing it. Although the title of the act will have its due share of consideration in the effort to determine the legislative intent, yet such title is not conclusive upon the subject of such intention. The intention of the legislature may be ascertained by considering the whole act, and construing one part by another, and one clause with reference to its connection with other clauses." *South Park Commissioners v. First National Bank,* 177 Ill. 234, 238, 52 N. E. 365, 366.
>
> "But the modern doctrine is that when the language of the statute is ambiguous, the courts can resort to the title as aid in giving such act its true meaning, but that this cannot be done when the language used is clear and unambiguous." *State v. Patterson,* 134 N. Car. 612, 614, 47 S. E. 808.

It is contended by plaintiffs in error that constitutional and statutory rights and privileges are infringed by the act of 1881, because a longer residence in the county and precinct is prescribed to entitle one to vote at such elections than is prescribed to qualify electors to vote at general elections. The answer to this is that the constitution itself specifically reserves to the legislature the right to determine the length of residence in the county, city, town, ward or precinct which may be required as a qualification for voting, and it is impossible to conceive how a regulation on that subject could violate any constitutional right. The fact is that section 2 of

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article 14 of the constitution provides that no person shall vote upon the proposition of removal of a county seat unless he shall have resided in the county six months and in the precinct ninety days prior to the election at which such proposition is submitted. Section 1 of article 7 of the constitution specifically reserves to the legislature the right to determine the length of residence required in the county, or precinct, as a qualification for voting. It therefore was purely a question for the legislature as to whether the same rule should be adopted as to residence in the case of an election to locate a county seat, as the constitution has already adopted in the case of an election upon the question of removal of a county seat. The length of residence required in the latter case was definitely fixed by the constitution, and the legislature was left free to determine the qualifications of voters at an election upon the question of the location of a county seat. Unquestionably, since there is no specific constitutional inhibition, and the statute is general applying alike to all similarly situated, the legislature had the power and authority to enact it. *Mayor, etc. v. Shattuck,* 19 Colo. 104, 34 Pac. 947, 24 Am. St. 208. It was a question of legislative policy pure and simple, with which the courts have nothing whatever to do. It may not, however, be amiss to suggest that many of the reasons which exist for requiring long residential qualifications to entitle electors to vote upon the question of removal of county seats are equally applicable upon the question of voting to locate county seats.

Incidentally it is urged that the act is unconstitutional, in that its subject is not sufficiently expressed in its title, which reads: "An Act to Regulate Elections for the Removal of County Seats." There seems no room to fairly doubt that the act was designed to provide both for elections for the change or removal and the permanent location of county seats. The title is broad and comprehensive enough to include elections for the removal of county seats whether temporarily or permanently estab-

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lished. The question of the permanent location of a county seat involves, or may involve, the question of removal, as much as does the question of the change of a county seat, and indeed both involve, or may involve, the question of retention of a county seat. In short, the real purpose of the act is to provide for the regulation of election for the selection of county seats. If the title had been more specific and had referred to elections for the removal of county seats already permanently established, there might be force in this contention. But as the title stands it applies as well, considered from a practical standpoint, to the regulation of an election where the question of the removal of a county seat temporarily located is submitted, which is an election upon the question of the permanent location of a county seat, as to an election for the removal of a county seat already permanently located. The act by its title is confined to a single subject, namely, that of the selection or designation of county seats, and the very fact that the title is broad and comprehensive in and of itself alone largely removes it from the constitutional objection urged, because any matter which may fairly be said to be germane to the main subject may be properly embraced in the act. It seems clear, upon a survey of the whole matter, that no member of the legislature could possibly have been misled or deceived by the language of this title, nor could any citizen of ordinary prudence be led astray by the fact that the title was not as definite and certain as exacting and critical counsel now insist that it should have been, which are among the chief evils intended to be met and overcome by this constitutional provision.

In the case of *Golden Canal Company v. Bright,* 8 Colo. 144, at page 149, 6 Pac. 142, 144, the following language upon this subject is used:

> "The constitutional inhibition must receive a reasonable construction. It is enough if the bill treats of but one *general subject,* and that subject is expressed in the title; to require that each subdivision of the subject, each and every of the 'ends and

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means necessary or convenient for the accomplishment of the object', must be specifically mentioned in the title, would greatly impede and embarrass legitimate legislation. Judge Cooley asserts that it would 'actually render legislation impossible.' Cooley, Const. Lim. 144."

And in the case of *Board of County Commissioners of El Paso County v. Board of County Commissioners of Teller County,* 32 Colo. 310, 76 Pac. 368, this court reiterates upon this question a like doctrine in the following language:

"The constitutional inhibition invoked only requires that the title to an act clearly express its subject, and not its provisions or the details by which its object is to be accomplished.—*People ex rel. Crowell v. Lawrence,* 41 N. Y. 137. Its mandate is observed if the legislation in the body of a statute is germane to the general subject expressed in the title of the act in which it appears. The test in this respect is, whether such legislation is relevant or appropriate to such subject.—In re *Breene,* 14 Colo. 401 [24 Pac. 3]; In re *Pratt,* 19 Colo. 138 [34 Pac. 680]; *Edwards v. R. R. Co.,* 13 Colo. 59 [21 Pac. 1011]; *Mollie Gibson C. M. & M. Co. v. Sharp,* 23 Colo. 259 [47 Pac. 266]."

We reach the conclusion, therefore, that there was no error on the part of the court in refusing leave to contestators to amend, as purposed, also that the election was held under the proper statute and that the result must be upheld. The trial court having reached a like conclusion, the judgment is affirmed.

Judgment affirmed.

Decision *en banc.*

Mr. JUSTICE WHITE not participating.

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[No. 8138.]

FORTE v. THE PEOPLE.

1. CRIMINAL LAW—*Murder—Circumstantial Evidence.* The evidence examined and held sufficient, though circumstantial, to sustain a conviction of murder in the first degree. (451, 455)

2. ——*Instructions*, are to be construed as a whole. (457)

3. JUROR—*Prior Opinion—Affidavits.* The examination of the juror upon the *voir dire*, had not been preserved. In support of his motion for a new trial the accused deposed, that on such examination one of the jurors stated that he had formed no opinion. Other affidavits disclosed that the juror had both formed and expressed the opinion that the accused was guilty. The juror himself, other jurors, and the district attorney, made affidavits that, upon his examination, he declared that he had formed and expressed an opinion which it would require evidence to remove, but if accepted he would set his opinion aside, and try the issue upon the merits, and that the accused passed the juror for cause. *Held* that the juror was not shown to be disqualified, and the court declined to disturb the findings of the District Court, to this effect. (457, 458)

Error to Pueblo District Court.— Hon. C. E. ESSEX, Judge.

Mr. THOMAS R. HOFFMIRE, and Mr. BERT MARTIN, for plaintiff in error.

Hon. FRED FARRAR, Attorney General, and Mr. FRANK C. WEST, Assistant Attorney General, for the people.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Plaintiff in error was convicted of murder in the first degree and sentenced to imprisonment for life. The victim was his wife. That she was murdered is beyond question, but as the conviction was had on circumstantial evidence it is urged on his behalf that the testimony to

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establish the circumstances pointing to his guilt and relied upon by the people was insufficient to support a verdict of guilty. The evidence on the part of the people is to the effect that deceased was at the home of her mother in the city of Pueblo on the afternoon of September 18th, 1912; that she left for her home, which was in another part of the city, and where she resided with her husband, about five o'clock P. M., leaving one of her children with her mother, and taking the other, a baby about eighteen months old; that she was dressed in a blue serge suit, and wore a ring which belonged to her sister; that during the evening the husband and wife were heard quarrelling, at their home, by neighbors living across the street, which continued for at least half an hour, during which the plaintiff in error was heard cursing his wife, but as such quarrels were of frequent occurrence little attention was given the matter. Mrs. Olson, the mother of the deceased, was to be married the next day, and, pursuant to an arrangement with her daughter was to spend the night of the 18th at the Forte home, and Mrs. Forte was to assist her the next day in buying clothes. Mrs. Olson was down town the night of the 18th with her fiance, in whose company she went to a picture show. Later they went to a restaurant, and from there to a ranch belonging to her intended husband, located about one mile from the end of the street car line. About one o'clock the morning of the 19th she arrived at the Forte home escorted by her fiance. She observed a light in the house, and after calling at the front door, and receiving no answer, went to the back door and entered the house. Neither Forte nor his wife was at home. She found the baby asleep and the dress the deceased had worn the day before hanging across the foot of the bed and her every day dress in the kitchen. The bed was stripped of covering except the sheets, one of which was on the middle of the bed in a wad. About an hour later Forte came in. Mrs. Olson stated that, "he was wringing wet with sweat and white". She asked him where he had been and he answered, at the Central Block,

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and when asked what for replied, to see Bessie (the deceased). Mrs. Olson then said, what did she go there for as she knew I was coming here. Forte said, to see a real estate man, and that while he was eating supper he heard an automobile in the alley, that she went out, and that he would have killed her if he had known she was going in the automobile. Mrs. Olson further stated that Forte wanted to call a policeman, or call in the neighbors, to which she objected, as at that time her suspicions were not aroused, and she thought Bessie had gone to her, (the mother's), home for the night. Mrs. Olson and Forte remained up all night, and in the morning she took the baby to her home,—Forte saying that he would get a lay-off and come down to her house, which he did about ten o'clock that morning.

It appears from the testimony that Forte was a section hand in the employ of a railroad company, and on the 18th of September was engaged with a section crew in clearing up a wreck which had occurred at a distance of about three-fifths of a mile from his residence, and that the crew, in order to remove the wreck, had dug two 'dead man' holes, designated in the record as the north and south holes. Both were of considerable length and depth. They had served their purpose and were to be filled, and there is some conflict in the testimony whether any dirt had been thrown into the south end of the north hole the afternoon of the 18th. There is testimony, however, that when the crew went to work the morning of the 19th there were about two feet of dirt in that part of the north hole. Forte reported for work that morning and was requested by the foreman to go to another point, and assist in putting in a crossing. He objected, saying he was expecting a telegram or message and wanted to remain where he was, and at once went to work filling up the south end of the north hole, shovelling dirt rapidly. He said nothing about his wife or children at that time. He worked for half an hour or an hour, when the hole at the south end, according to the testimony of some of the witnesses, was filled level with the surface,—while

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others state the dirt was about four feet deep at that point and that there was no dirt in the north end of the hole at all. Forte quit work at this time saying his wife had left him the night before, and that he wanted to go home and see about the children. He then went to the foreman and made the same statement about his wife leaving him and that he had to go and take care of the children and said he would be back in a few days. Witnesses also state that he did not receive any telegram or message while at work, and said nothing more to them on the subject. Several weeks prior to this time Forte had commenced a divorce proceeding against his wife, one object of which was to secure possession of a considerable sum of money which he claimed he had given his wife. She filed a cross-complaint in which she asked for a divorce. The proceedings were pending at the time of her disappearance, and Mrs. Olson testifies that she loaned her money on the 18th to assist her in paying the expenses of the divorce proceeding, which it was her intention to prosecute. On Friday, the 20th, Mrs. Olson, in company with Forte, visited the Forte home. She stated that she was familiar with all the wearing apparel of her daughter; that she looked over the house and found that all the wearing apparel was there, that her daughter had, which included her dresses, underclothes, shoes and hats. The same day Forte was at the home of Mrs. Olson when he accidentally dropped the ring deceased was wearing the day of her disappearance. It rolled under a table. He looked around to see if this was observed, and as quickly as possible recovered the ring and replaced it in his pocket. Two or three days later Forte was arrested for the murder of his wife, and taken to the office of the district attorney, who asked him what had become of his wife's ring. He denied having any ring, but finally drew it out of his pocket, wrapped in a handkerchief. When asked where he found it he said, under a table at his house, after his wife had gone. At another time he stated that he found the ring tied in a handker-

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chief on the dresser at his house. About the middle of the week following the disappearance of deceased, Mrs. Olson again visited the Forte home, at which time she took the sheets from the bed, the under one of which had spots on it. About this date the brother and brother-in-law of deceased, at the suggestion of the foreman of the section crew, visited the holes to which we have referred, and Sunday night following again went to the north hole, and dug at the south end, with the result that at a depth of five or six feet they found the body of deceased. The body was practically nude, having on only a short jacket or waist, and a short dressing sacque. The ankles were tied with a cord, a rope made out of cotton cloth was around the neck, a cloth over the face, and one witness says the hair was done up, or was not down. The physician who examined the body testified that the hair was braided down the back, and that there was a rope around the neck, made out of cloth rolled together, the ends of which were tied with a string; that the tongue was protruding and there was a bloody serous fluid which had stained the rope; that the nose was pressed flat on the face, as if it had been held down by something, and that in his judgment it was an *ante-mortem* condition; that he examined the body for bruises and wounds, and could not find any injuries of that kind, and was of the opinion that the victim came to her death by suffocation due to strangulation by means of the use of the rope. The doctor further testified that he had examined the cloth found over the face, that it was saturated with a bloody serous fluid from the body of a human being, and of the kind that would ooze from the mucous membranes, such as the throat and nose; that it was not from an incision, but of a character which would result from pressing. He also stated that he analyzed one of the spots on the sheet taken from the bed by Mrs. Olson and obtained the same results. There was also considerable testimony introduced relating to threats made by Forte against his wife, to the effect that he had beaten and threatened to kill

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her; that about two weeks prior to her death he picked up an ax, and said he had a notion to split her head with it; that at another time he said he would cut her head off, and put her in a hole, and that nobody would know anything about it, and that he frequently called her vile names. The testimony of the mother and a sister of deceased fixed her weight at about 110 or 115 pounds. The doctor stated that she might have weighed as much as 145 or 150 pounds; but at the time he viewed the body it was very much swollen.

We think this evidence, though circumstantial, was ample to justify the jury in reaching the conclusion that the accused was guilty as charged, beyond a reasonable doubt. He instituted an action against his wife for divorce, one object of which was to recover a considerable sum of money which he claimed was his, and in her possession. She had filed a cross-complaint, and on the day she disappeared was evidently intending to take steps to secure a divorce. He and deceased were quarrelling the evening of the 18th at their home. Such quarrels were of frequent occurrence. He had often threatened to take the life of his wife. At 2 A. M. the morning of the 19th he returned home, pale, dripping with perspiration, and agitated. He knew that the north hole had served its purpose, and was to be filled. He stated to Mrs. Olson that his wife had gone to a real estate office the evening of the 18th to see a real estate man. He also intimated that his wife had run away, leaving in an automobile. These statements were evidently fabrications when it is considered that all the clothing of deceased was in the house. The morning of the 19th he left the house, as he said, to secure a lay-off. Instead, he went to work at the south end of the north hole, shovelling dirt into that part of the excavation, working rapidly. At that time there was some dirt in that end of the hole, when there was none the day before,—the exact condition which would exist if he had thrown the body into that part of the hole the previous night, and covered it with dirt. He objected

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to working at any other point, giving as his excuse that he expected a message. When the south end of the hole was filled, or dirt to the depth of several feet had been thrown in, he stated for the first time that his wife had left him, and that he wanted to go home and see about his children. Afterwards the body was found in the end of the hole which he assisted so vigorously to fill, and when filled to such extent as would prevent discovery of the body by other members of the crew, left the place without saying anything about the message he expected. These acts, in connection with his objection to working at another point, would be the course he would pursue if he had murdered his wife and placed the body in the hole, the night before, and covered it with dirt sufficient to temporarily hide it from view. He had possession of his wife's ring she wore the day she disappeared. When he dropped it at the home of Mrs. Olson he appeared concerned about whether it had been noticed. When arrested he denied having the ring, but finally produced it, and made conflicting statements as to where he found it. The body, when found, was nude. None of the clothing of deceased was missing. She had been strangled. The spots upon the sheet were blood spots of a character which would ooze from the throat or nose of a person killed by strangulation. These facts and circumstances clearly point to the fact that some time after deceased arrived home on the 18th, and before Mrs. Olson arrived at the house, defendant strangled the deceased, and carried, or in some way conveyed, her body to the hole where it was afterwards found. They are consistent with defendant's guilt, and inconsistent with any reasonable hypothesis of his innocence and sufficient to justify the jury in determining that he was guilty as charged, beyond a reasonable doubt, although no eye-witness saw the crime committed.

On behalf of the defendant evidence was introduced to the effect that Bessie was seen on the street down town the evening of the 18th between 9 and 10 o'clock, and that defendant was down town that evening from 8:30 to 10:30

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and was looking for his wife. Defendant testified that he was down town that evening trying to find his wife; that he thought he saw her near a picture show; that his wife told him before leaving the house that she was going to the Central Block to meet her mother; that he went there and remained about half an hour; that he afterwards visited several saloons, naming them; that later he went to a picture show; that he boarded a car about midnight, and reached home at 12:30; that his wife was not there, and he returned to the street car line, thinking she might be on the last car, and came back to his house; that Mrs. Olson was there, and on looking in the dresser he found that $75.00, a diamond pin, a ring and a watch were gone. He denied that the sheets introduced in evidence belonged to him.

It was the province of the jury to pass on the credibility of the witnesses who made these statements. They did not believe them and the record fully supports this conclusion.

It is next urged that the instructions on the question of alibi deprived the defendant of the application of the rule of reasonable doubt. The instructions on this subject must be considered as a whole and when so read it is clear the objection is not tenable. The same question was raised in the recent case of *Foster v. People*, 56 Colo. 452, 139 Pac. 10, where, in considering instructions quite similar, it was held to be without merit.

In support of the motion for a new trial the defendant presented affidavits stating that one of the jurors had expressed an opinion and belief that the defendant was guilty, prior to his examination on his *voir dire*. The questions and answers of the juror touching his qualifications were not preserved. Counsel for defendant stated in his affidavit that the juror when examined said he had not formed or expressed an opinion regarding the case or the guilt or innocence of the defendant. On the part of the people the affidavits of the district attorney, the juror, and other jurors who sat with him in this case,

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were submitted, in which it was stated in substance, that the juror said he had formed and expressed an opinion which would require evidence to remove but, if accepted, he would disregard his opinion and try the case upon the merits and the instructions of the court. They further stated that counsel for plaintiff passed the juror for cause. From these statements on behalf of the prosecution it does not appear the juror was disqualified.

The court determined the question at issue in favor of the people. The affidavits on their behalf support this finding and we will not disturb it on review: *Smith v. People,* 39 Colo. 202, 88 Pac. 1072; *Johnson v. People,* 33 Colo. 224, 80 Pac. 133, 108 Am. St. 85.

The judgment of the District Court is affirmed.

Judgment affirmed.

CHIEF JUSTICE MUSSER and MR. JUSTICE HILL concur.

[No. 8163.]

THE PEOPLE EX REL. ALICE PAULINE BROXHOLM, v. PARKS ET AL.

1. INFANT.—*Custody.* In proceedings affecting the custody of an infant the paramount and controlling consideration is the welfare of the child. (462)

2. ——*Right of Parent.* The right of the parent to the custody of the child is not an absolute right, and will never be enforced where opposed to the interest and welfare of the child. (463)

The mother of a child sued to obtain its custody. It appeared that her purpose was to deliver the child to a third person. This fact was held to eliminate from consideration the claim of the mother, and that the case was governed by the general rule. (462)

Error to Mesa District Court.—Hon. CHAS. CAVENDER, Judge.

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Mr. CLAY B. WHITFORD, and Mr. HENRY E. MAY, for plaintiff in error.

Messrs. FRY & WELSH, for defendant in error.

The subject matter of controversy is the custody of a little girl, Winifred, now about seven years of age. The mother instituted habeas corpus proceedings below against Mr. and Mrs. Parks to secure the custody of the child, and from a judgment adverse to her, has brought the case here for review on error.

Winifred was born out of lawful wedlock May 7, 1907, in London, England. The mother not being able to care for her gave her to a Mrs. Pearse when she was eight months old. This arrangement was effected through a solicitor representing the mother, and was evidenced by an indenture, by the terms of which Mrs. Pearse adopted the child, and agreed to maintain, educate, and clothe the infant in all respects as if the infant were her natural child, and the mother covenanted that she would not at any time thereafter, in any way, directly or indirectly, seek or claim to recover possession or control of her child, and would not interfere with the adopting party's sole and absolute guardianship and control of the infant. The husband of Mrs. Pearse was a wealthy man and had a fine home in the vicinity of London. Mrs. Pearse took the babe to Paris, and returned to England a few weeks later. She was in ill health, and traveled extensively, taking the baby and a nurse with her. For a time in 1908 they were in Colorado. In February, 1909, Mrs. Pearse returned to England with the child. Mrs. Parks, then Rose McCary, the sister of Mrs. Pearse, and who lived at Grand Junction, visited Mrs. Pearse in England in August of that year. In November following they returned to Grand Junction with the child, and took up their residence in a house belonging to Miss McCary, where Mrs. Pearse died January 1st, 1911. During this period Mrs. Pearse was very ill most of the time, and Miss McCary

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had entire charge of the child. There is some conflict in the testimony on that subject, but the trial court found as we have stated, and we adopt that finding.

Miss McCary was married to Mr. Parks in October, 1910. Mrs. Pearse left a will in which she expressed a desire that Mrs. Wadsworth, another sister, also residing at Grand Junction, should have the care and custody of the child, but as she was not able to assume this responsibility the child remained with Mrs. Parks. Mr. and Mrs. Parks stand well, having excellent reputations in every respect. Mr. Parks is a substantial citizen, in comfortable circumstances financially. Winifred is well cared for by the respondents, and it is their intention to give her such education and advantages as will render her happy, and as they would bestow upon the little girl if she were their own. They have no children, and have reached that age when it is not probable they will have any. Mr. Parks is in the cattle business, resides on his ranch in the summer, where he has a comfortable house well furnished, and lives in Grand Junction during the winter months. There is not a word of testimony that respondents are not fit persons to have the custody of the little girl. On the contrary the testimony establishes that they are. Several other members of Mrs. Parks' family reside in Grand Junction or that vicinity and are excellent people.

Shortly after the death of Mrs. Pearse, Mr. Pearse wanted to take the little girl back to England, and demanded her custody. The respondents refused to give her up, and later endeavored to have the mother give her to them, which she refused. Mr. Pearse returned to England, called on Mrs. Broxholm, informed her of the situation and secured from her a document by which she intrusted the custody of the child to Mr. Pearse on terms similar to those in the document given Mrs. Pearse. Mr. Pearse returned to Grand Junction and instituted proceedings in the District Court of Mesa County to obtain the custody of the child, which were not successful.

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Some time before the death of Mrs. Pearse, the mother married Mr. Broxholm, a London solicitor, who has a comfortable home and is prosperous. Two children were born of this marriage. There is nothing in the record before us to indicate that either Mr. or Mrs. Broxholm are not fit persons to have the custody of Winifred. After the action instituted by Mr. Pearse was decided against him, Mrs. Broxholm instituted the proceedings we are reviewing. She and her husband testified to the effect that if the custody of Winifred was given Mrs. Broxholm, she would be taken home for a while and then put in school.

The trial judge found as a fact that if the custody of the child was given Mrs. Broxholm, it was her intention to turn her over to Mr. Pearse. We think the testimony supports this finding. The evidence does not establish that Mr. Pearse is unfit in any way to have the custody of the child. On the contrary it appears that he is an excellent man in every respect, but the trial court determined that the best interests of Winifred demanded that she be left with the respondents and discharged the writ. Both parties appear to concede that the contracts with Mr. and Mrs. Pearse are without validity under the law of England and this country, and do not preclude the relator from claiming the custody of her infant.

Mr. JUSTICE GABBERT delivered the opinion of the court:

On behalf of relator it is contended that motherhood makes a *prima facie* case for her and entitles her to the custody and control of her child, unless it clearly appears she is not a fit person to be given such custody and control.

Relator executed two contracts by which she purported to surrender all care, custody and control of the child to strangers. These contracts may not be strictly binding upon her, but they are proper to consider in determining her intention with respect to the child, as they evince a purpose not to exercise the rights of mother-

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hood. The trial court found as a fact from testimony sufficient to sustain it, that the purpose of relator if she secured control of Winifred, was to turn her over to Mr. Pearse. This fact eliminates the question of the fitness of relator to have the custody of her infant, and the decision of the case must therefore turn entirely upon the application of the rule that in proceedings affecting the custody of an infant the paramount and controlling question by which the court must be guided is the interests and welfare of the child, or as tersely stated by some authorities, "The welfare of the infant is the polar star by which the discretion of the court is to be guided." *Wilson v. Mitchell,* 48 Colo. 454, 111 Pac. 21, 30 L. R. A. (N. S.) 507; *Breene v. Breene,* 51 Colo. 342, 117 Pac. 1000; *McKercher v. Green,* 13 Colo. App. 270, 58 Pac. 406; *Andrino v. Yates,* 12 Idaho, 618, 87 Pac. 787.

Mr. Pearse is a worthy man, but to give him the custody and control of Winifred, although it is the desire of her mother, means that the child will be intrusted to the care of strangers who would simply be employed for that purpose, while if permitted to remain with respondents she will be cared for and nurtured by persons prompted to discharge these duties by affection for her. They have the means to give her a good education and have evinced the intention to do so. They have excellent reputations in every respect, are eminently proper persons to be intrusted with her custody, and it appears that if left with them, she will be given the same advantages as though she were their own child. In short in their custody and control she will be well cared for and educated, and have that affection bestowed which is necessary to the welfare of a child. True her environments will be different from what they would be should she be taken to England, but this does not establish that her welfare would be better subserved by such a change. In the circumstances of this case we think her interests require that she remain in the custody and control of her foster parents.

It is contended on behalf of relator that as respon-

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dents are entirely without right to claim the custody of the child by any action on the part of either Mrs. Pearse or the mother that they should not be permitted to resist the action. The right of a parent to the custody and control of a child is not an absolute and uncontrollable right, like a right in property, and will never be enforced when it is apparent that its enforcement is against the best interests and happiness of the child. *Chapsky v. Wood,* 26 Ks. 650.

The judgment of the District Court is affirmed.

Judgment affirmed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 8224.]

HOGG v. BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY.

STATUTES—*Construction—Repealing Statute.* A statutory clause purporting to repeal prior statutes is to be interpreted by the same rules as other enactments. The intention of the legislature must prevail over a literal interpretation. The title of a statute may be referred to, to aid in its interpretation. (469)

And the reason, or the absence of reason, for the interpretation sought to be placed upon the enactment. (469, 470)

Considering that by title of c. 181 of the Laws of 1903, it appears to have been the purpose of the legislature to deal with the estates, and not with the persons, of the insane; that it shows no intent to disturb the law relating to the trial of the sanity of a citizen; that no provision is made for the trial of an issue, in such cases, elsewhere than in the County Court, which had for so many years exercised the jurisdiction; that the act itself refers to the jurisdiction as still continuing; (§ 50) that it expressly provides for an inquisition in the County Court, upon allegation of the lunacy of a non-resident (§ 54), it was held that § 174 of the act was not intended to repeal the provisions of § 2204 of the General Statutes of 1883, as amended by c. 119 of the Laws of 1893. (470)

Error to San Miguel District Court.—Hon. THOMAS J. BLACK, Judge.

Mr. W. L. HOGG, pro se., Mr. L. W. ALLEN, Mr. J. M.

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WOY, Mr. M. L. BROWN, and Mr. E. B. ADAMS, for plaintiff in error.

MESSRS. BARNETT & CAMPBELL, and CARL J. SIGFRID, for defendant in error.

Mr. JUSTICE GABRIGUES delivered the opinion of the court:

1. **Statement of the Case.** August 22, 1913, a complaint was filed in the county court of San Miguel county alleging the respondent, Thomas B. McMahon, a citizen of said county, was so insane or distracted in his mind as to endanger his own property, or the person and property of others, if allowed to go at large. The court forthwith issued an order for his apprehension, upon which, the following day, he was arrested by the sheriff, and August 28, 1913, the court ordered a jury summoned to inquire into his sanity. On the trial W. L. Hogg, plaintiff in error, was summoned and testified as a witness on behalf of the People. Respondent filed a motion to quash the complaint upon the following grounds: "First, because the County Court is without jurisdiction to inquire into the matter of the lunacy of said Thomas B. McMahon, and it is without authority and jurisdiction to hear and determine the same by or through a jury in the said court or otherwise. Second, that the said complaint and the process thereon under which the said T. B. McMahon is being held in custody, was issued without warrant or authority of law. Third, that there is no provision of law for an inquest of lunacy of the said T. B. McMahon, by a jury or otherwise in the said court; and his detention under said process is in violation of the constitution of the state of Colorado, and the constitution of the United States, sec. 1, art. 14 thereof." This motion was overruled. The facts were submitted to a jury which returned a verdict that respondent was not insane, and the court thereupon discharged him, and taxed all the costs of the proceeding against the county. The county commissioners refused to pay these costs, including Hogg's witness fees, and he appealed his claim to the

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District Court where the case was docketed: *"W. L. Hogg, appellant, v. The Board of County Commissioners of San Miguel county, appellee."* Upon a trial, the District Court found the statute providing for a jury in the County Court in lunacy cases had been repealed; that the County Court had acted without jurisdiction; it sustained the action of the county commissioners, dismissed the appeal, and taxed the costs to Hogg, who, bringing the case here, assigns the following errors: "First, that it erred in dismissing the appeal of plaintiff in error from the Board of County Commissioners of San Miguel county, Colorado. Second, that it materially erred in failing to give judgment to plaintiff in error upon his appeal from said board to said court. Third, that it materially erred in holding that chapter 181 of the Session Laws of 1903, repealed the statute providing for the inquisition of lunacy, namely, section 2204 of the General Statutes of 1883. a. Because said statute of 1903 did not repeal the statute concerning the inquisition of lunacy. b. Because said statute of 1903 did not purport to repeal the statute concerning the inquisition of lunacy. c. That if said statute of 1903 did purport, and did intend, to repeal the statute concerning the inquisition of lunacy, that then the Act of 1903 was unconstitutional and void, for the title to the Act was insufficient. d. That said chapter 181 of the Session Iaws of 1903 did not purport to repeal nor did it mention in the repealing clause, section 2204 of the General Statutes of the State of Colorado, as amended by chapter 119 of the Session Laws of 1893, entitled 'Lunatics'."

By stipulation it was agreed that the whole controversy as to the cost bill in the County Court should be determined on the appeal of Hogg to the District Court, thereby avoiding the necessity of appealing each individual case.

2. Statement of the Lunacy Statutes. Section 1, Revised Statutes 1868, provides in substance that the probate court of the county where any lunatic resides, shall, on written application, empanel a jury to inquire

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into the facts, and if the jury finds he is insane, to appoint a conservator of his estate. Section 28 provides, if the sheriff finds any lunatic in his county at large, he shall arrest and confine him until his sanity can be tried as provided in section 1. Upon the adoption of the constitution, no change was made in these sections by the General Laws of 1877, except to change the name from "Probate" to "County Court".

In 1879 the legislature repealed sections 1 and 28, but enacted in lieu thereof, other sections retaining the same numbers, 1 and 28. These sections, passed in 1879, are printed in the General Statutes of 1883 as sections 2204 and 2231, sub-sections 1 and 28. Sub-section 1 (General section 2204) provides in substance: upon filing a complaint in the County Court alleging that any insane person has property, and is incapable of managing it, the judge shall summon a jury to inquire into such facts, and if the jury return a verdict that he is so insane as to be incapable of managing his estate, the court shall appoint a conservator. Sub-section 28, (General section 2231) provides: that the County Court or judge thereof shall order the apprehension of any insane person against whom there is written complaint; and for the apprehension, without order, of any insane person found at large, and whether the arrest be by or without an order, the person arrested shall be taken before the County Court or judge, who shall hold an inquest as provided in section 1.

In 1893, these sections, 1 and 28, were again amended as follows:

"Section 1. That section 2204 of the General Statutes of the State of Colorado be, and the same is hereby amended so as to read as follows: Section 2204. Whenever any reputable person shall file with the County Court, or with the judge thereof in vacation, a complaint duly verified, and shall allege therein that any person in such county is a lunatic, or an insane person, and is so distracted in mind, as to render such person incapable of properly and safely attending to his affairs, or managing his estate, and praying that inquiry thereinto, be had, the

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court if satisfied that there is good cause for the exercise of its jurisdiction, shall thereupon order a jury consisting of six jurors to be summoned to inquire into such facts; and if such complaint be filed in vacation the judge of said court may call a special term thereof, for the purpose of said inquiry. If it shall be alleged in said complaint and proved to the satisfaction of the court that said lunatic or insane person has personal or real estate, and if the jury shall return in their verdict that such person is so insane, or distracted in mind as to render him or her incapable of managing his or her estate, it shall be the duty of said County Court, to appoint some fit person to be the conservator of said estate."

"Section 28. Whenever any reputable person shall file with the County Court a complaint duly verified (or whenever complaint duly verified shall be filed with the County Court by an authorized medical examiner, as hereinafter provided) alleging that any person in said county is so insane or distracted in his mind, as to endanger his own person and property, or the person and property of another, or others, if allowed to go at large, the County Court, or the judge thereof, shall forthwith issue an order in the name of the people, directing any person who shall be appointed by said county or judge, or any officer of said court, to execute the same by immediately taking such patient into custody; *Provided,* that when any sheriff or constable shall find within his county any such insane person at large, it shall be his duty to apprehend such insane person without an order of court; and when any alleged insane person shall be so arrested by or without an order of court, he or she shall be taken forthwith before the County Court, or the judge thereof, and if the alleged insane person so elect, an inquest as provided for in section 1 shall be held without delay * * *."

Sections 1 and 28 regarding inquests in lunacy, and the management of the estates of the insane, remained in its general plan, scope and effect the same from 1868 to 1903, when the legislature passed the enactment (Chapter 181, page 469, Laws of 1903), giving rise to this litigation. The act relates to the probate of wills, the administration of the estates of deceased persons, minors and persons

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mentally incompetent, and repeals certain acts in relation thereto. Section 50 provides in substance: Upon representation to the County Court that a person is so insane as to be incapable of taking care of his estate, the court will, if it appears that he has not been adjudged insane, cause such adjudication to be had as in inquests of lunacy, and if he is adjudged mentally incompetent, appoint a conservator of his estate. Section 54 relates to the trial in the County Court of non-resident lunatics having property in Colorado. It provides in substance, that after the issues are joined, they shall be set for trial and tried (in the county court) by a jury as in other inquests of lunacy. Section 55 provides in substance, if upon the trial in the County Court such non-resident lunatic is declared insane, the County Court shall appoint a conservator. Section 174 provides: "Sections numbered * * * 2204 to 2225 inclusive * * * of the General Statutes of Colorado * * * are hereby repealed."

Section 1, Laws of 1893 (2204 General Statutes 1883) is omitted from the compilation of 1908 in which section 28 (2231) is inserted as section 4127.

3. Contentions of the Parties. It is claimed by the county commissioners, that the County Court in lunacy cases, has no jurisdiction to try the facts other than that conferred by statute; that the statute conferring such jurisdiction is section 28, page 333, Laws of 1893 (sec. 2231 G. S., 1883, sec. 4127 R. S. 1908) which provides that an inquest shall be had as provided in section 1; that section 1 is section 2204 G. S., 1883, and was expressly repealed by section 174, page 535, Laws 1903, and ceased to exist at that time, leaving the County Court without power to order a jury to try the facts, and took away the jurisdiction before conferred by statute to try the sanity of a citizen.

On the other hand, it is contended by Hogg that the repeal of section 2204 G. S., 1883, did not repeal section 1, page 331, laws of 1893; that the legislature had no intention in chapter 181, Laws of 1903 to take from the County Court jurisdiction to try the sanity of a citizen;

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that the express repeal of section 2204 is subject to the same rules of construction and interpretation as other enactments, and when so construed, it will be found the County Court still has jurisdiction to try lunacy cases.

4. Opinion of the Court. A clause in a statute purporting to repeal other statutes is subject to the same rules of interpretation and construction as other enactments, and the intention of the legislature must prevail over a literal interpretation. *Smith v. People,* 47 N. Y. 330; *Pratt v. Swan,* 16 Utah. 483, 52 Pac. 1092; *Howlett v. Cheetham,* 17 Wash. 626, 50 Pac. 522; *Home B. & L. A. v. Nolan,* 21 Mont. 205, 53 Pac. 758; 36 Cyc., 1069 and notes.

In determining whether the legislature by section 174, chapter 181, Laws of 1903, intended to repeal section 2204, G. S., 1833, as amended by chapter 119, Laws of 1893, so as to deprive the County Court of jurisdiction to try the sanity of a citizen, we must look to the intent, and not to a literal interpretation.

The title of the act of 1903 shows the intent of the legislature by that enactment was to deal with the estates and not the persons of the insane. It relates to the probate of wills, the administration of the estates of deceased persons, minors and persons mentally incompetent, and to the repeal of certain acts in relation thereto. "In relation thereto", mentioned in the enactment, refers to the repeal of statutes relating to the estates of the insane, not to the persons. The act refers to the management of their estates, not the procedure for the trial of the insane. The primary object of the legislature was a codification of laws relating to the administration of the estates of deceased persons, minors and the insane. Nearly three pages are devoted by section 174 to the enumeration of particular acts and parts of acts which are repealed, showing that this section was merely subordinate to the general plan of revision. The title of the act indicates no intention to disturb the law relating to the trial of the sanity of a citizen.

Another method of arriving at the intention of the

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legislature is the reasonableness of the legislation. There is no reason why the legislature in 1903 desired or intended to take from the County Court a jurisdiction it had so long exclusively exercised. If it intended to do this, it is remarkable no provision was made for the trial of such cases elsewhere.

In the next place, the Act itself refers to that jurisdiction as still continuing. Section 50 of the Act provides, upon representation to the County Court that any person is so insane as to incapacitate him from caring for his estate, if it appear to the County Court that no adjudication as to his sanity has been had, the County Court shall cause such adjudication to be had as in inquests of lunacy. As in inquests where, in what court? Where would the County Court cause such adjudication to be had except in that court. Yet it is contended that the legislature by the identical Act that required the adjudication to be had in the County Court, intended to take away its jurisdiction, which is an absurdity.

Section 54 in dealing with non-resident lunatics having property in this state, provides that after the issues in lunacy are joined in the County Court, they shall be tried by a jury in that court as in other inquests in lunacy. Can it be successfully contended that the legislature meant to confer on the County Court jurisdiction to try non-resident insane persons at the same time, by the same Act, deprive that court of jurisdiction to try resident insane persons? Certainly not. So from the title of the act of 1903, reference to the jurisdiction of the County Court as continuing, and the unreasonableness of legislation depriving the County Court of jurisdiction over the persons of the insane, we think it incredible that the legislature by section 174, chapter 181, Laws of 1903, intended to repeal that portion of section 1, chapter 119, laws of 1893 conferring jurisdiction upon the County Court in inquests of lunacy.

Reversed and remanded.

Decision *en banc.*

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[No. 8276.]

NICHOLS v. KATRES.

APPEAL AND ERROR—*Adjustment by Parties—Effect.* Where the parties to a judgment have adjusted their controversy a writ of error to review the judgment will be dismissed, even though there is depending the claim of the attorneys of the successful plaintiff below, to a lien upon the judgment, and a dispute as to the amount to be awarded to the attorneys. This controversy, must, in the first instance be adjusted in the lower court. (472)

Error to El Paso District Court.—Hon. J. E. LITTLE, Judge.

Mr. W. E. CLARK, for plaintiff in error.

MESSRS. ORR, ROBINETT & MASON, for defendant in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court.

Plaintiff in the court below, Katres, obtained a judgment against Nichols in the sum of $4,250.00 damages on account of injuries sustained from being run over by an automobile. The law firm of Orr, Robinett & Mason were plaintiff's attorneys, and before the trial, filed notice of a claim for attorneys' lien for their services on any judgment that might be obtained. Nichols brings the case here on error and asks for a supersedeas, and defendant in error has filed a motion to dismiss the writ and proceeding, for the reason the judgment sought to be superseded has been settled. Plaintiff in error in resisting the motion to dismiss, has set out in full, as an exhibit, the contract of settlement and release he made with Katres. This instrument, dated February 19, 1914, recites in substance that Katres, being desirous of terminating the liti-

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gation, and securing an adjustment and settlement of the case has, in consideration of $1,525.00, agreed upon a settlement and release with Nichols. It states that $250.00 of this money has been deposited with the Central Savings Bank & Trust Company of Denver to pay Katres' doctor, and hospital bills; that $525.00 has been paid to him directly in money, and provides that the remaining $750.00 is to be paid to Orr, Robinett & Mason, unless they can be settled with for less, in which event, whatever is saved out of the $750.00 shall be paid to Katres; that if the attorneys who filed the lien refuse to accept the $750.00, it shall be paid into the registry of the court. The agreement recites: I, the undersigned, agree to and do release said Charles Hersey Nichols from any and all claim or demand which I now have or which I may hereafter have, and which has or may hereafter accrue to me, because of injuries received by me on August 23rd, 1913, and because of which injuries the action herein first above stated was instituted."

Orr, Robinett & Mason refused to accept the $750.00 or any part thereof.

There is nothing for us to review, on account of the settlement. It is no longer a case of actual controversy involving substantial rights between litigants, and presents now only moot questions of law in which we have no concern. The case no longer is one of any practical importance. The parties have settled it, and we can grant neither any relief. *Floyd v. Cochran,* 24 Colo. 489, 52 Pac. 676; *Knowles v. Harrington,* 45 Colo. 346, 101 Pac. 403; *Burns v. National Co.,* 47 Colo. 557, 108 Pac. 330; *Hawthorne v. Hendrie,* 50 Colo. 346, 116 Pac. 122; *Lane v. Lyon, ante* 166, 140 Pac. 197.

The only question remaining over which a dispute or legal controversy might arise, is the attorneys' lien, its amount and enforcement, which controversy must be settled in the first instance in the lower court. Nichols, having settled the case with Katres, cannot now prosecute the writ of error for the purpose of defeating an

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alleged attorneys' lien, which is all there is left in the case.

The motion to dismiss the writ of error will be sustained.

Writ dismissed.

Decision *en banc.*

[No. 7320.]

MOFFAT ET AL. v. CITY AND COUNTY OF DENVER.

1. MUNICIPAL CORPORATIONS—*Streets— Franchises Granted Therein.* The prime purpose of a street is to provide a way for public travel; an easement in the sub-surface, even for lawful purposes is not an absolute right, but subordinate to the rights of the public therein, and subject to the powers of the municipal authorities to make such reasonable improvement or changes therein as in their judgment the public interest demands. (477, 478)

A water company had laid pipes for the conduct of water through the streets of a municipality whose inhabitants it served; this by authority of a franchise granted by the municipality, and without any provision that the pipes when laid should not be disturbed. Upon the excavation of the street by the City to form a subway, in order to avoid grade crossings of certain railroads, it became necessary to remove the conduit and locate it at great expense, upon another route. The water company was denied compensation for the expense so necessarily incurred. (478)

By an ordinance adopted subsequent to the commencement of the work, and an agreement pursuant thereto, it was provided that the railroad companies, a certain tramway company, and the city, should each bear one third of the expense of the improvement, and that the tramway company should have the right to use a specified width of the subway, on one side thereof for the passage of its cars, and should maintain this portion of the subway in repair, the same being separated from the residue by a fence. It did not appear nor was it claimed that if the city had constructed the subway at its own expense, the grade or dimensions would have been different from those specified in the contract. *Held* that inasmuch as the franchise granted to the tramway company had in no way increased the burdens of the water company, it afforded no change in the rule. (480, 481)

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Certain engineers testifying as well as for the water company as for the City agreed that at another location the damages to the Water Company would have been less; but *held* that the judgment of the city authorities as to the location of the improvement was conclusive unless it was made clearly to appear that their selection of the route was unreasonable, or dictated by some fraudulent purpose; there being no evidence of this character, nor what it would have cost to construct the subway over the other route, the claim of the Water Company that it was unnecessarily damaged by the location of the subway at the point selected was rejected. (481)

2. CONSTITUTIONAL LAW—*Taking Private Property.* The improvement of the street by the City, rendered necessary by a change in the pipes of a water company located therein by authority of a municipal franchise is not the taking of private property. (479)

3. COUNTY ROADS—*Easement In.* That an easement granted by the owner of the abutting land to lay and maintain in a county road, pipes for conducting water, is, like a similar easement in the streets of a city subordinate to the paramount right of the public to subject it to the public use, when necessary, without compensation.

The rule is the same when the easement is obtained in a county road which afterwards becomes part of the public street of a city. When the lands are brought within the limits of the city, the road becomes at once subject to the control of the municipal authorities. Changing the grade, or constructing a subway therein is not an additional servitude. (482)

4. EMINENT DOMAIN—*Future Damages.* All damages, present or prospective, which are the reasonable and necessary result of an improvement, are taken into account, and compensation awarded therefor; but not speculative damages which may by possibility result from future municipal action, for a different purpose. (482, 483)

5. COSTS. Section 6598 of the Revised Statutes is not unconstitutional. *Dolores Co. v. Hartman*, 17 Colo. 138, and *Denver Co. v. Howe*, 49 Colo. 256, distinguished. (483)

Error to Denver District Court.—Hon. GREELEY W. WHITFORD, Judge.

MR. GERALD HUGHES, MR. BARNWELL S. STEWART, MR. JOHN Q. DIER, and MESSRS. HUGHES & DORSEY, for plaintiffs in error.

MR. I. N. STEVENS, MR. GEO. Q. RICHMOND, and MR. C. K. O'BYRNE, for defendant in error.

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Mr. JUSTICE GABBERT delivered the opinion of the court:

Defendant in error instituted proceedings under the provisions of article 4, chapter 147, Revised Statutes, 1908, against plaintiffs in error and others, to acquire property for the purpose of opening, widening, and extending West Alameda Avenue west. This avenue is intersected by numerous railroad tracks, and the purpose of the proceedings was to provide for the construction of an open cut subway underneath these tracks, to be used in connection with the avenue as extended, whereby grade crossings would be avoided. The title to part of the property involved, embraced in the west part of proposed extension, was held in trust for the use and benefit of the Water Company by the other plaintiffs in error, through which the company had constructed water mains and other appurtenances in connection with its waterworks system. Connected with these appurtenances it had placed a twenty-four inch pipe line in that part of the avenue adjacent to and intersected by the railroad tracks, and also in what is known as County Road No. 44, which runs west from the west end of the avenue, as it existed when the proceedings were commenced, to the lands held in trust for the Water Company. It had also constructed in these several highways, and in County Road No. 48, which runs in a northwesterly direction from the end of Road No. 44, abutting the lands of the Water Company on the east, a twelve inch pipe line, which extended to South Jason street on the north.

The Commissioners appointed filed a report fixing the damages which the company would sustain in removing and reconstructing its twenty-four inch pipe line at the sum of $8.92 per foot, for so much thereof as it would be necessary to remove and reconstruct as a result of the change of grade and excavation for the subway. To this part of the report the city filed objections, in so far as it awarded compensation for condemning the twenty-four inch pipe line and right of way or easement therein in

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County Roads numbered 44 and 48, and West Alameda avenue, based upon the ground that these pipe lines were in public highways of the municipality, to which the company replied, that the construction of the subway would result in the destruction of the twenty-four inch line in the ground occupied by the subway, and that it would have to be replaced by a new line on a new route. It also replied, that the portion of its twelve inch pipe line within the site of the subway would be destroyed and would have to be replaced by a new line over a new route.

The issues thus made were tried to the court. It appears from the testimony that the use of West Alameda avenue by the company for the construction and maintenance of its water works system was authorized by a franchise from the City of Denver and a contract with the city, and that the company had an easement or right of way in perpetuity by deed in County Road No. 44, from the owner of the abutting property for its twenty-four inch pipe line. These roads were established in 1881, and the deed was obtained subsequent to that date. Prior to obtaining this deed, the territory embracing the portions of these roads involved was annexed to the city, and the deed in question was obtained after that was done. By the terms of the franchise and contract the city did not thereby expressly covenant that the pipes when laid in the streets should not be removed or disturbed, in the event a change of grade in such streets was ordered, or other public improvement therein made. In other words, the franchise and contract were silent on this subject. The city admitted that it would be necessary for the company to reconstruct its twenty-four inch pipe line from a point substantially at the east end of the subway to a point in the premises held in trust for the company abutting the end of County Road No. 44, adjoining County Road No. 48. The city offered to obtain and furnish the company with a new right of way for the reconstruction of this line, and in view of that proposal the Water Company agreed to limit its claim for damages in this connection to the cost of reconstruction. It is also admitted that the

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twelve inch line would have to be removed from the east end of the subway through the avenue, County Roads Numbers 44 and 48, above mentioned, and reestablished from a connection with the new twenty-four inch line to a connection with the old twelve inch pipe line in South Jason street. The testimony established that the expense of such removal and reconstruction would entail an expense of over twelve thousand dollars. The city also admitted that a part of the twenty-four inch pipe line, located in the premises held in trust for the company, would have to be reconstructed over a new route, and a part of the line within these premises lowered. The court found that 283 feet of the 24 inch pipe line, within these premises, would have to be removed in part, and part lowered, at an expense of $10.00 per foot, and awarded the company the sum of $2,830.00 damages on this account, and refused to allow damages for the removal and re-construction of any other part thereof, or for the twelve inch line, for the reason that these lines were in a public highway of the City and County of Denver.

On the part of plaintiffs in error it is claimed that the trial court erred in refusing to allow the Water Company damages for taking and depriving it of its right of way through that portion of West Alameda Avenue as it existed at the time the proceedings in condemnation were instituted. In support of this claim it is urged that the right which the company acquired by its franchise and contract with the city to place and maintain pipe lines connected with its water works system in this part of the avenue, is a property right of which it cannot be deprived without just compensation, and that its damage in this respect is the expense incurred in removing and reconstructing this part of its pipe lines over a new route.

The prime purpose of a street is to provide a way for the use of the people at large for travel on foot and in ordinary vehicles. The power to grade streets and construct subways for the safety and convenience of the

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public is vested in the city authorities. They may grant an easement in its subsurface in the manner and for the purposes by law provided, but the right thus granted is not absolute. It is only qualified. Placing pipes in the avenue under the franchise granted by the city, and contract to which we have referred, did not give the Water Company a vested right to have them remain as placed and undisturbed. The rights thus granted were subordinate to the rights of the public therein, and subject to the power of the municipal authorities to make such reasonable changes in the grade or an improvement therein as in their judgment the public interests demanded and required. Consequently, the Water Company is not entitled to be compensated for the expense incurred in removing and reconstructing its pipe line over a new route, which was necessitated by a change of grade and the construction of the subway. Refusing reimbursement for such expenses is not taking property for a public use without just compensation. *Columbus Gas & Coke Co. v. City of Columbus,* 50 Ohio. St. 65, 33 N. E. 292, 19 L. R. A. 510, 40 Am. St. Rep. 648; *Matter of Petition of Deering,* 93 N. Y. 361; *Stillwater Water Co. v. City of Stillwater,* 50 Minn. 498, 52 N. W. 893; *Anderson v. Fuller,* 51 Fla. 380, 41 South. 684, 6. L. R. A. (N. S.) 1026, 120 Am. St. Rep. 170; *Scranton Gas & Water Co. v. Scranton City,* 214 Pa. 586, 64 Atl. 84, 6 L. R. A. (N. S.) 1033, 6 Ann. Cas. 388; *City of San Antonio v. San Antonio St. Ry. Co.,* 15 Tex. Civ. App. 1, 39 S. W. 136; *New Orleans Gas & L. Co. v. Drainage Commission,* 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831.

If the proper officials of a municipality could not exercise their authority or discharge their duty to make such reasonable changes in the grade of a street or an improvement therein, as in their judgment the convenience and safety of the public require, except by first making compensation to any utility corporation which had previously acquired an easement in the street, their authority and duty would be seriously interfered with.

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Counsel for plaintiffs in error also base their argument that the Water Company is entitled to damages in the particulars under consideration upon the proposition that the right granted it by its franchise and contract with the city, is an easement which cannot be damaged without compensation, when damages occur as a result of putting a street, in which the easement existed, to an extraordinary and unusual use by the construction of a subway, and liken the right of the Water Company to compensation in such circumstances to the right of an abutting lot owner to damages. It will be conceded that the easement thus acquired was property, but as stated, it was subject to the right of the municipal authorities to make reasonable changes in the grade of the street. It was not a right like an abutting property owner, whose right to compensation for putting a street in front of his premises to an extraordinary use, arises from the fact that he is such owner. He acquires no interest in the street from the city, but his interest therein attaches by virtue of his ownership of the abutting lot, as an incident to it, while in the case of the Water Company it has no interest whatever in the abutting property, but its rights are limited and measured by the legal conditions under which its easement in the street is granted. *Columbus Gas & Coke Co. v. City of Columbus, supra; Scranton Gas & Water Co. v. City of Scranton, supra.*

By an ordinance duly passed provision was made for widening, extending and establishing West Alameda Avenue west. Pursuant to this ordinance, the condemnation proceedings were commenced by the city. Subsequently, by virtue of an ordinance a contract was entered into between the city, The Denver Tramway Company and the railroad companies owning and operating the tracks intersecting the avenue, whereby it was agreed that each should bear one third of the expense of constructing the subway, which should include the costs and damages awarded by virtue of the condemnation proceedings then pending in the name of the city. It further provided that

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the Tramway Company should have the right to use the south twenty-six feet of the subway for street car, suburban railway or railroad purposes. The Tramway Company was required to keep and maintain this portion of the subway in repair at its own expense, while the city obligated itself to maintain the other part of the subway as a road way. We assume from the language of the contract that the Tramway Company had the right to lay tracks over and along the avenue in which the subway is constructed. Except where the tramway tracks cross the subway, substantially at its east end, the road way and the part occupied by the Tramway Company are divided by a fence. It is claimed that by this contract, and the fact that the public is excluded from the portion of the subway occupied by the Tramway Company, the right of way and easement of the Water Company are taken and condemned for the use and benefit of the Tramway Company, and hence, the construction of the subway must be deemed an unusual and extraordinary change in the grade of the street and character of its use, which entitles the Water Company to be compensated for the damages resulting from the removal and reconstruction of its pipe lines.

We do not regard this contention as tenable. The city had the right to condemn for the purposes of constructing a subway and extending and widening the avenue. So far as advised from the record or briefs of counsel, the city had the right after the subway was constructed to grant the Tramway Company the use of a part thereof for street car purposes. It does not appear, nor is it claimed, that had the city constructed the subway at its own expense, the grade and dimensions would have been any different from the grade and dimensions provided in the contract. So that the contract with the tramway and railroad companies, the right granted the former by its terms, and the construction of the subway in accordance with its provisions, have not resulted in imposing upon the Water Company any greater burden than would have been imposed had the contract by which the

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city was relieved of part of the expense of constructing the subway, not been executed. In other words, had the city constructed the subway at its own expense, the Water Company would have been compelled to relay its pipe lines regardless of the right granted the Tramway Company, and the damages sustained by the Water Company by the construction of the subway, are not in any manner increased by granting the Tramway Company the rights acquired under the contract.

The civil engineers who testified, both for the city and the Water Company, agreed that from an engineering and also a railroad standpoint, a better location for the subway would have been along West Byers Place, a street north of West Alameda Avenue. It is claimed that if the subway had been constructed in the street mentioned the damages to the Water Company would have been much less.

There appears to be some basis for this claim, and it is therefore urged that there has been unwarranted interference with the rights of the Water Company in West Alameda Avenue. We are not advised from the record what the expense of constructing a subway in West Byers Place would have been as compared with the expense of constructing it over the route selected. All that is said on the subject by the engineers is to the effect that West Byers Place was a more feasible route for the construction of the subway. What is meant by this is left to mere conjecture. The city authorities were vested with sound discretion in locating the subway, and the exercise of this discretion and judgment is conclusive, unless it clearly appears that their action was fraudulent or unreasonable. *City of Denver v. Kennedy,* 33 Colo. 80, 80 Pac. 122, 467.

It is next urged that the court erred in refusing to allow the company damages for the expense of removing and reconstructing its pipe lines through the portion of County Road No. 44, now a part of the avenue as extended, for the reason that the company had acquired an easement from the abutting property owner to lay

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and maintain its pipes therein. It may be conceded, without definitely expressing an opinion, that the owner of property abutting a highway may make such use of the land within the latter as will not interfere with its use for public travel, and that he may transfer this right to others. Such right however, is subordinate to the paramount right of the public to require the abutting land owner to discontinue such use without compensation, when the public use to which it may lawfully be subjected necessitates this course. Nichols, Power of Eminent Domain, section 71. Nor does the fact that the easement was obtained in what was formerly a part of a County Road change the situation. When this part of the road was included within the limits of the municipality it became subject to the control of the municipal authorities, and constructing a subway therein, or changing the grade thereof, for these purposes is not an additional servitude upon the abutting lands. *Ehret v. Camden & T. R. Co.*, 61 N. J. Eq. 171, 47 Atl. 562; *Hiss v. Baltimore & H. P. R. Co.*, 52 Md. 242, 36 Am. Rep. 371. Hence the right which the abutting owner coneveyed the Water Company in these highways is subject to the authority of the municipality to construct the subway without compensating the Water Company for such right.

Through a portion of the land owned by the Water Company taken for the street as extended, lying west of the part in which the pipe line was in part reconstructed and in part lowered, the company had a twenty-four inch pipe line which was not disturbed. It is claimed, however, that damages should have been allowed or assessed for the easement remaining, because at some future time the city may require the company to shift its pipe line or remove it, and therefore the assessment should have embraced this contingency. In support of this, *Denver City I. & W. Co., v. Middaugh,* 12 Colo. 434, 21 Pac. 565, 13 Am. St. 243 is relied upon. The case is not in point. True, in assessing damages in condemnation proceedings, all damages present and prospective, that are the natural, necessary or reasonable incident of the improvement for

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which the property is taken should be assessed. But this does not apply to the contingency of future action on the part of the city which might necessitate the removal of the pipe or other change, as that is dependent upon such action. In other words, should the company be required at some time in the future to shift or remove its pipe line in the road way through its private lands taken for street purposes, the expenses thus incurred are in no sense the natural, necessary or reasonable incident of the taking at this time.

By the decree of the trial court it was provided that petitioner pay the costs up to the time of, and including the filing of the report of the Commissioners, and that plaintiffs in error pay the costs incurred by them subsequent to the filing of such report. With respect to costs the statute, section 6598, Rev. Stat., 1908, provides: "The costs of the proceedings up to and including the filing the report of the Commissioners shall be paid by the city, and as to any costs caused by subsequent litigation the costs shall be paid by the losing party." Counsel for plaintiffs in error contend that this provision is unconstitutional, for the reason that requiring a respondent in condemnation proceedings to pay any part of the costs is an infringement of his constitutional right to full and just compensation for taking and damaging his land. As applicable to this case we think not. If either party is dissatisfied with the award of the Commissioners, objections therto may be filed. If this course is pursued a new issue, so to speak, is presented, namely, whether the award should stand, and there can be no valid objection to taxing the costs in such proceedings to the losing party, although he be the respondent. He takes the chances when objections are interposed to the report if he contests them, of having them sustained, wholly or in part, and when he does so and is rightfully defeated, he ought to pay the reasonable costs entailed by such proceedings. This is a different proposition from taxing him with any part of the costs down to the time the Commissioners make their report, as that would reduce the amount of

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compensation to which he is entitled before his property can be taken or damaged. There is some conflict in the decisions on the question presented, but we think the weight of authority upholds the statutory provisions under consideration, and that the taxation of costs in the particulars involved is controlled by the statute on the subject.

Delores Canal Co. v. Hartman, 17 Colo. 138, 29 Pac. 378, and the *D. L. W. & P. Co. v. Howe*, 49 Colo. 256, 112 Pac. 779, are not in point. Those cases involved the question of costs under the general eminent domain act.

The judgment of the District Court is affirmed.

Judgment affirmed.

Decision *en banc*.

Mr. JUSTICE HILL not participating.

[No. 7631.]

THE DENVER CITY TRAMWAY COMPANY v. BROWN.

1. EVIDENCE—*Judicial Notice*, taken, that in populous parts of a city, street car tracks may be, and are likely to be, used by children for play. (489)

1. EVIDENCE—*Judicial Notice*, taken, that in populous parts of a railway company for injury to a child, playing in the street. A witness for the defense was cross-examined as to statements attributed to her, as made to one Fuller, on the day of the accident. She denied making the statement. Fuller, examined in rebuttal affirmed the making of the statement by the former witness, and testified that on that occasion, she declared that the defendant was to blame, that they did not give any child any chance to get away. On the authority of *Denver v. Lomovt*, 53 Col. 292 the testimony was held properly admitted. (492,

3. APPEALS—*Verdict Upon Conflicting Evidence.* Where a case has been properly submitted, the weight and sufficiency of the evidence is wholly for the jury, and their verdict will not be set aside except

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in case of palpable wrong. Any other rule would invade the constitutional right of trial by jury. (494)

4. ——*Harmless Error.* Action for injuries to a child by the negligent operation of a street railway car. Evidence was received that children had been seen playing on the street, in that vicinity, at other times. *Held* that the jury could not thereby have been misled into any improper inference. (489)

5. STREET RAILWAY COMPANY—*Duty Towards Children Playing in the Street.* It is the duty of a street railway company to take notice that, at any place, children may be occupying the street, in their play, and it is under duty to exercise a degree of care commensurate with the circumstances, and such as would be exercised by a reasonably prudent person, in like case. And in the populous portions of a city it must exercise greater circumspection and care.

Where one in charge of a street railway car, sees, or by due care would have seen, a child of tender years, upon or in near proximity to the track, it is his duty to sound a warning, and immediately get his car under such control as to enable him to avoid injury to the child. (498, 499)

6. NEGLIGENCE—*Imputed.* The negligence of a parent in permitting a young child to play in the public street, where street cars are operated, is not to be imputed to the child. (493)

Appeal from Denver District Court.—Hon. J. W. SHEAFOR, Judge.

Mr. GERALD HUGHES, and Mr. HOWARD S. ROBERTSON, Mr. FREDERICK P. SMITH, for appellant.

Mr. STEPHEN W. RYAN and Mr. HORACE N. HAWKINS, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is a proceeding to review a judgment of the district court of the city and County of Denver, awarding the defendant in error, $7,500.00 as damages in a case of personal injury.

The plaintiff below, at the time of the accident, was a child a few days under five years of age. He was struck and severely injured by one of the defendant com-

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pany's cars, causing the amputation of one foot, and other severe injuries. The accident occurred on Cherokee street in the city of Denver, where the defendant company has two tracks, out-going and incoming. This street runs north and south, and the boy was injured by a north bound car. Cherokee street is intersected by the following streets, named in their order from south to north: Cedar, Bayaud, Archer, Ellsworth, Irvington Place and First Avenue.

The accident occurred between Irvington Place and First Avenue. The plaintiff's parents lived in a terrace situated on the northwest corner of the intersection of Cherokee street and Irvington Place. There was a passage-way at the rear or north end of the house. The little boy and a playmate had purchased toy kites, and the plaintiff had called to his mother to come out and see him fly his kite. She went out with him into the passage-way and toward the street, and just prior to the accident was on or near the sidewalk next to their home, which was on the west side of Cherokee street. The boy started into the street going in a southeasterly direction toward the car tracks, looking backward at the kite that he was attempting to fly. The north bound car came along and struck him causing injuries. The acts of negligence relied on are: the failure to sound a gong or bell, or to otherwise give warning; that no brakes were applied, and no attempt made to stop the car until after it struck the boy; and, that by the exercise of due diligence the motorman could have seen the danger to the boy in time to have avoided the accident. The testimony justifies the conclusion that the boy started backward into the street, not directly toward the tracks, but in a diagonal direction leading toward the tracks, and facing or looking back at the kite which was attached to a short string about three feet long and which he held in his hands.

As to the rate of speed at which the boy was proceeding, how long he stopped on the sidewalk, or if he did so at all, there is a conflict of evidence, and this was submitted to the jury under proper instructions. It is not

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within the province of this court, in the absence of palpable wrong, to disturb the finding of the jury.

The distance from the house line to the inner rail upon which the car was running was about forty feet. In the diagonal direction in which he proceeded, this distance would be greater. After striking the plaintiff, the car proceeded about one hundred and twenty feet before it was stopped. It appears that the car had not stopped for any purpose, for a distance of about three blocks, and did not stop at Irvington Place, the last street crossing, before the accident. This statement of fact is not given as evidence of or constituting negligence, but as showing one of the surrounding circumstances. The tracks at that point are upon substantially level ground with a clear view along the street for three or four blocks distant from the point where the accident occurred. The evidence shows the car to have been running at normal speed, estimated by defendant's witnesses, at from twelve to fifteen miles per hour.

The testimony is very conflicting. The contention of defendant below, was that the boy darted suddenly from a position of safety on the sidewalk out into the street, and run into the side of the car. That of the plaintiff, that at the time of the accident he was in a position of danger, which by the exercise of due care, could have been seen by the motorman in time to have prevented the injury, and that the boy was in front of the car when he was struck.

At the close of plaintiff's testimony the defendant moved for a directed verdict, and again for a non-suit, and at the close of all the testimony the defendant again moved for a directed verdict, all of which motions were denied by the court, and these rulings, among others, are assigned as error in the case.

The testimony of plaintiff's witnesses shows that the boy was struck by the fender of the car while he was at a point between the rails of the track upon which the car was running. The testimony of the defendant's witnesses tends to show that he ran directly into the car at

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the side of it, and at a point where the number of the car was placed, being on the side of the front part of the car, which was enclosed. The rear portion of the car was open and furnished with cross seats, while the front part of the car was enclosed and with seats running along the side. There is testimony to show that the lower part of the figures constituting the number on the car, between which it is testified the boy struck the car, is very much higher from the ground than the height of the plaintiff, and this together with the character of the injuries sustained, may well have caused the jury to doubt testimony to the effect that the child run into the side of the car.

The mother of the boy, and other witnesses, testified that the car did not stop at Irvington Place, and that no gong or bell was rung, nor brakes applied, nor other warning of its approach. Mrs. Brown, the mother, testified that she was looking at the child as he was trying to fly his kite and supposed that when he left the curbing he intended to go down the street, that she did not hear the car, and that there was no warning whatsoever of its approach. Also, that there was sufficient time for the motorman, after he could have seen the danger, to have stopped the car and prevented the injuries.

There was also the testimony of witness Maher, who says that he was a passenger on the car and boarded it at a point three or four blocks from the accident; that during that time and shortly prior to reaching Irvington Place, somebody in the car called to the motorman, who opened the door between the car proper and the vestibule, and with his face turned to the inner part of the car, engaged in a conversation with a passenger; but that the witness was reading a paper or magazine and could not say that the motorman was so engaged either at the time of the accident or at the time of crossing Irvington Place.

This testimony was denied by the motorman and is not corroborated by any other witness, although there

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were but two other persons in the particular compartment of the car.

There is an assignment of error as to other testimony of this witness, to the effect that he had for a long time passed over this street on the car each day going to and from his work; and that it was customary for children to be playing in and about the street at the place where the accident occurred.

It appears from the evidence also, that there were some vacant lots just across Cherokee street from plaintiff's home, and on the corner, commonly used by children as a play ground, and where some were playing at the time of the accident. It is urged by the plaintiff in error that this evidence establishes the existence of conditions at other times, disconnected from the time of this accident, and for the purpose of establishing what care the motorman should have exercised under the particular circumstances shown to have existed at the time this accident occurred, and had for its object and purpose the fixing of a standard of care and caution not in accordance with the conditions confronting the motorman on the occasion in question, but upon other occasions. This contention cannot be sustained, for there was no other particular occasion suggested in the testimony, and no other fact than that the street had been used by children in crossing and for play at other times. In fact the testimony amounts to but little if anything more than a commonly known fact, derived from experience, and of which courts take judicial knowledge, that in populous portions of the city, street car tracks may be and are likely to be, obstructed by children using the street for play and otherwise. There is no testimony in the case that indicates that at the time of the accident, or at any other time there were other children in a position of danger save and except in the case of the plaintiff. So that the jury cannot have been mislead into drawing any inference to the effect that there was at some other time any particular or specially dangerous occurrence. It is en-

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tirely competent in such a case to show that the accident occurred in a thickly populated portion of the city. And it is but a natural and lawful inference, to be drawn therefrom, that children are likely to play in the residence streets where the city is so thickly populated, so that the testimony in this case amounts to no more than what the jury might have justly inferred.

The court very properly instructed the jury as to the law in this regard as tending to define ordinary care under such circumstances, as follows:

"That in the operation of such cars it is the duty of the defendant company to recognize that children may from time to time be occupying and using the said streets. That the degree of care which must be then exercised by the defendant is that which is commensurate with the circumstances of such use, as the same would be taken into consideration by a reasonably prudent person engaged in the operation of such cars. That in populous portions of the city it is the duty of the company to exercise added care and watchfulness, lest the track should be obstructed by children using the street either for play or otherwise, and that in general the degree of care which the company must exercise, under all of the circumstances, may be defined to be that degree of care which would be used by an ordinarily prudent person to prevent the happening of injury."

The case does not come within the rule announced in *Denver City Tramway Co. v. Cowan,* 51 Colo. 259, 116 Pac. 136, for that had to do with testimony as to another and different accident, and in another and different place, and involves an entirely different principle of the law. Examples illustrating the general rule of law as to negligence in cases similar to the one at bar, are given by Mr. Nellis in his work on Street Railways, as follows:

"Where a motorman sees or ought to have seen, that a child less than six years of age is in such a situation or so acting as to expose him to danger from an advanc-

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ing car, of which he is unaware, such motorman should get the car so fully under control as to avoid injury, and give warning and take such other measures as would prevent injury. A motorman cannot assume that a child seven years old, hurrying toward the track, and looking in the opposite direction, will not go on the track in front of the car. The courts have held that * * * where a child two years old was walking on a street car track toward a car approaching on an adjoining track, and crossed over onto such track about two lengths in front of the car, and was run down, there being nothing to obstruct the view of the motorman, a finding that he was negligent was justified; that where an electric car, which ran over and killed a boy six years old, was running near a schoolhouse, where children were on the street, at a rate of 25 miles an hour, without notice, by gong or otherwise, a verdict for the plaintiff was sustained by the evidence; that where defendant's street car was running slowly, and plaintiff, a child four years of age, walking from the direction the car was coming, went obliquely on the track about twelve feet ahead of the car, and, although persons shouted to the motorman, he either looked toward them or was talking to another employe, and the child was struck and injured, the motorman was guilty of negligence. And the motorman of an electric car is not, as a matter of law, free from negligence in running over a child 2½ years old, who, after crossing the track a few feet in front of the car, suddenly turned back on the track, where the car was going slowly and was distant 50 or 100 feet when the child left the sidewalk; nor in running over and killing such a child, who is on the track in the middle of a block where just before the accident his face had been turned away from the track while talking to a passenger, and no signal of the approach of the car was given. Nor is the motorman of an electric car free from negligence, as a matter of law, in running a car at the rate of 10 miles an hour through a street crowded with children on which his view in front was un-

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obstructed, with his eyes fixed on one child only; nor in failing to see a child less than 2½ years old until she was in front of and almost under the car, when a passenger saw her start across the street before the car started."

Another assignment of error is the admission of certain testimony on rebuttal of a witness named Fuller. A witness for the defendant, Mrs. Towns, testified in substance that she saw the boy come from between the two terraces and start to run with the kite, looking back, and strike the side of the car right at the number; and that she saw him fall along the side of the car. This would indicate that the boy ran suddenly out, and into the car, and in that respect is in conflict with the testimony of the plaintiff's witnesses, and tends to support the theory of the defendant as to the proximate cause of the accident.

Upon cross examination the witness was asked as to the substance of her statements alleged to have been made in a conversation with Fuller, had in his grocery store on the day following the accident, and which statement she denied making.

On rebuttal Fuller testified as to this conversation and said: "I talked with Mrs. Towns the next morning after the accident, and she said the tramway company did not give him any show. They did not ring their gong nor give him a chance to get away. The tramway was to blame."

It is argued that this statement by Mrs. Towns to Fuller, was a mere expression of opinion and does not conflict with any statement of fact in her direct testimony, and that the admission of Fuller's testimony as to the statement, was highly prejudicial to the defendant.

This question was determined adversely to the contention of the defendant by this court in the case of *Denver City Tramway Co. v. Lomovt,* 53 Colo. 292, 126 Pac. 276. In that case a witness testified for the defendant

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and was asked if he did not say at the time of the accident, that the motorman ought to be lynched, which alleged statement he denied. Upon rebuttal two witnesses were permitted to testify that he did make such a statement.

Mr. Justice Hill, after an extensive review of the authorities, said:

"Applying the general principles announced in the books heretofore cited, to the facts here, we think this alleged statement of the witness Murray was of such a character that the jury might rightfully draw the inference that it was equivalent to a declaration that the motorman was negligent in the operation of his car, and was therefore inconsistent with his testimony at the trial, and under the circumstances of this case was proper as an inconsistent statement as affecting the credibility of his evidence."

Complaint is made as to error in instructions given and refused, but we find no error in this respect. An examination of all the instructions discloses that they are very complete, and appear to have been considered by the court with unusual care as applied to the facts in the case, and with due regard to the contentions of both plaintiff and defendant.

The plaintiff in error also assigns as error the refusal of the court to accept the doctrine of imputed negligence and in giving the following instruction:

"No. 2. The jury is instructed that you will entirely disregard the defenses sought to be interposed by the defendant of the negligence of plaintiff's parents, or either of them, at the time when, and the place where, the injury occurred."

We cannot sustain the doctrine that the negligence of the parents of a child of tender years, shall be imputed to the child, first announced by the New York courts, and since followed by courts in some jurisdictions. That doctrine seems not only unsound, but absurd and inhuman.

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In 29 Cyc. 553, it is said in the text: "According to the great weight of authority, in an action brought for the benefit of a child who has sustained injuries through the negligence of another, negligence on the part of the parents, or those standing in *loco parentis* will not be imputed to the child nor bar a recovery by him. The rule announced in *Hartfield v. Roper,* has received severe condemnation in many of the courts repudiating it as authority, and is very generally regarded as unsound by text-writers. In his work on negligence Judge Thompson says: 'That it should be adhered to in any enlightened jurisdiction with respect to children is a reproach to the judges who uphold it. An adult person, when he commits his person to the custody of another, does so at least voluntarily; an infant does not select his custodian—it is selected for him by the laws of nature, or by circumstances beyond his control. Certainly, there is no reason why the ordinary principle that where one is injured by the concurring negligence of two persons, he has an action against either or both, should not apply in the case of an injury to a child, unless the imputation is to be put upon the law of denying to feeble and helpless infancy the same measure of protection which it accords to adults. Such a conception is cruel, heartless, and wicked. It can only hold in jurisdictions where property is placed above humanity.'"

It is clear that the real contention in this case is as to the weight and sufficiency of the evidence to sustain the verdict. But when a case has been properly submitted to the jury, this matter is wholly within its province, and is one with which appellate courts can ordinarily have nothing to do. The jury is a constitutionally organized body, with powers none the less positive and absolute in character, because they are limited in scope. The jury is as much an integral part of our system of jurisprudence as are the courts. It has its separate province, duties, and prerogatives. These have been well defined and well understood since the adoption of

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the jury system. For courts to trespass upon, assume or usurp the prerogatives of the jury, is to that extent, to invade the constitutional guaranty of the right of trial by jury. Doubtless many mistakes and errors of judgment have occurred upon the part of juries. But it can be said that courts are not guiltless in that respect. Perhaps the members of this court, sitting as jurors, may have reached a different conclusion in this case, but that would have been in the exercise of their judgment as jurors. Courts may not lightly set aside the united judgment of men constituting a jury, and are not justified in doing so, except in case of palpable wrong. Neither must we overlook the fact that the learned trial judge in this case, four times passed upon the question of the sufficiency of evidence in the case, required to authorize its submission to the jury for determination. And this was done with the apparent very clear understanding of the universal rule of this court in that regard, for in passing upon the question the court declared:

"As a matter of fact, I think there is sufficient evidence to go to the jury. If it was clear to me that there was no evidence at all, I should not hesitate to perform the duty that devolves upon me, but when I think there is evidence, as there is in this case, I shall overrule the motion."

We have carefully read all the testimony in the case and are clearly of the opinion that the court was fully justified in this conclusion.

By the constitution, trial courts are in general made the one forum of litigants subject to review only, by appellate courts as to errors occurring. The constitution especially confers original jurisdiction upon district courts to try all cases, both at law and in equity, whatever may be the magnitude. This court must appreciate the power, dignity and responsibility of trial courts, so contemplated by the fundamental law, and are bound to pay due respect to the judgment of such courts, particularly as applied to a matter of review of the evidence presented

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to the jury, and in the hearing of the court. Finding no substantial error occurring upon the trial, the judgment is affirmed.

MUSSER, C. J., and GARRIGUES, J., concur.

On Motion for Re-Hearing.

Counsel for appellant in their brief in support of their motion for re-hearing, lay stress upon the contention that the instruction quoted in the opinion requires a higher degree of care than is justified by law or precedent, and say:

"This conclusion of the court, if allowed to stand, will have a far-reaching effect on the trial of all damage cases, in that it will require, upon the part of the employees in charge of a car, that the same should be operated at all times upon the theory that children may come upon the tracks. This is contrary to all established principles, for the reason that in operating a car, or any other vehicle, the degree of care required in being watchful for the safety of children is of a higher character than that generally applicable, and is only brought into play when children are either actually seen upon the track or when in the exercise of reasonable care they should have been seen."

Courts have used various expressions as to the degree of care required in such cases. Thus in the following cases the term "ordinary care," is used: *Hanley v. Ft. Dodge Light & Power Co.*, 133 Iowa, 326, 107 N. W. 593, 110 N. W. 579; *United Rys. & Elec. Co. v. Carneal*, 110 Md. 211, 72 Atl. 771; *Galveston City Ry. Co. v. Hanna*, 34 Tex. Civ. App. 608, 79 S. W. 639. And in other cases "high degree of care": *Bergen Traction Co. v. Heitman*, 61 N. J. Law, 682, 40 Atl. 641. And, again, "highest degree of care": *Murray v. Patterson Ry. Co.*, 61 N. J. Law, 301, 39 Atl. 648.

Notwithstanding these differing expressions as to the degree of care required, they all amount to this, that the

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person in control of the car must exercise such care as a reasonably prudent man would exercise if placed in the same situation and surrounded by the same conditions.

What would be the requisite degree of care under one state of circumstances would not be under another. What would be reasonable conduct on the part of a motorman where his car is proceeding through a wide thoroughfare with children playing upon the sidewalk many feet distant, would not justify the standard where the street is narrow and the sidewalk much nearer the track. In such a case it is the proximity of the sidewalk to the track which bears upon the question of negligence in the operation of the car and not the broad statement that danger need not be anticipated where the child is playing upon the walk. Each case must depend upon the circumstances and conditions surrounding it, and the question of negligence is to be determined by these circumstances and conditions, and what a reasonably prudent man would have done in the same situation.

There is evidence in this case from which the jury might reasonably conclude that the motorman by the exercise of diligence could have seen the child at such distance in advance as to have stopped his car if under proper control, and to have avoided the accident.

And where children are upon the street through which a car runs the law imposes upon the motorman the duty of keeping the car under such control as a reasonably prudent man would exercise under the same circumstances and conditions.

What would be a reasonable rate and degree of control consistent with the proper degree of care required in some cases might, under a different state of facts, amount to negligence. Bringing the car to a full stop may, under certain conditions, be the only course which fulfills the requirement set, while in others it is only necessary that the car should be under such control that it may be brought to an immediate stop. *Sheffield Co. v. Harris* (Ala), 61 So. 88; *Chicago City Ry. Co. v. Tuohy,* 196 Ill. 410, 63 N.

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E. 907, 58 L. R. A. 270, affirming 95 Ill. App. 314; *Danna v. City of Monroe,* 129 La. 138, 55 South. 741; *Gray v. St. Paul City Ry. Co.,* 87 Minn. 280, 91 N. W. 1106; *Simon v. Metropolitan St. Ry. Co.,* 231 Mo. 65, 132 S. W. 250, 140 Am. St. Rep. 498; *Cytron v. St. Louis Trac. Co.,* 205 Mo. 692, 104 S. W. 109; *Meeker v. Metropolitan St. Ry. Co.,* 178 Mo. 173, 77 S. W. 58; *Wagner v. Metropolitan St. Ry. Co.,* 79 App. Div. 591, 80 N. Y. Supp. 191; *McFarland v. Elmira Water, Light and Railroad Co.,* 136 App. Div. 194, 120 N. Y. Supp. 292; *Tatarewicz v. United Traction Co.,* 220 Pa. 560, 69 Atl. 995; *Galveston City Ry. Co. v. Hanna,* 34 Tex. Civ. App. 608, 79 S. W. 639; *Monrean v. Eastern Wisconsin R. & L. Co.,* 152 Wis. 618, 140 N. W. 309.

There can be no hard and fast rule as to the exact rate of speed or degree of control to be exercised where children are in the street but there is a rule applicable in all cases, that the motorman must operate his car at the rate of speed, and have it under such control, as a reasonable prudent man would if placed in the same circumstances. The question of negligence must in each case, be determined by the facts and circumstances as they existed at the time of the accident.

When a child is in a position of danger, the motorman has no right to speculate as to what the conduct of the former may be. He has no right to assume under such circumstances, that the child will abandon such position and proceed to one of safety, and continue regardless of the peril, to operate his car, acting upon such assumption. His belief as to what the child will do will not relieve him of his duty to exercise the required care and control over his car. *Citizens' St. Ry. Co. v. Hamer,* 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; *Simon v. Metropolitan St. Ry. Co.,* 231 Mo. 65, 132 S. W. 250, 140 Am. St. Rep. 498.

It is likewise the duty of the motorman, and particularly in a thickly populated portion of a city, to keep a careful lookout at all times to see whether a person is upon the tracks or by reason of his approaching them, is in a position of peril. While this rule is not confined to

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children, it is all the more important to be observed in such case, and a proper performance of that duty carries with it the obligation of the motorman to exercise his power of observation for the purpose of discovering whether children are in a dangerous position either upon or near the tracks. *Hanley v. Ft. Dodge Light & Power Co.*, 133 Iowa, 326, 107 N. W. 593, 110 N. W. 579; *Louisville Ry. Co. v. Bryant*, 142 Ky. 159, 134 S. W. 182; *Baird v. Citizens' Ry. Co.*, 146 Mo. 265, 48 S. W. 78; *Bergen County Traction Co. v. Heitman*, 61 N. J. Law, 682, 40 Atl. 641.

The jury in this case was fully justified in finding that the motorman did not ring the gong or give other warning of the approach of the car, and plaintiff in error now contends that inasmuch as the car was not immediately approaching a street, it was not its duty to ring the gong. This is not the law. Whenever a car of a street railway company is rapidly approaching a point in the highway where existing conditions render it apparent that the danger of injury to the public will be materially lessened by sounding the bell, it is the legal duty of the company and its motorman to sound the bell, and the failure to do so is negligence. *Murphy Administrator v. Street Railway Co.*, 73 Conn. 249, 47 Atl. 120. It is clearly as much the duty to make this effort to minimize or avoid danger at any place on the highway as at street crossings. Indeed, the placing of the gong upon the car may be regarded as recognition by the company of the duty to keep a careful lookout.—*Consolidated City & C. P. R. Co. v. Carlson*, 58 Kan. 62, 48 Pac. 635; *Gray v. St. Paul City Ry. Co.*, 87 Minn. 280, 91 N. W. 1106; *Butler v. Metropolitan St. Ry. Co.*, 117 Mo. App. 354, 93 S. W. 877; *Byrnes v. Brooklyn H. R. Co.*, 148 App. Div. 794, 133 N. Y. Supp. 243; *Hoon v. Beaver Valley Traction Co.*, 204 Pa. 369, 54 Atl. 270.

It is quite true that accidents frequently occur as the result of a child suddenly leaving a place of safety and darting upon the tracks. And that while a motorman

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may not speculate as to the course a child may pursue, yet where he sees one at such a distance from the track as to be in no danger and there is no apparent intention of the child to abandon that position, a failure to run the car at the same rate of speed as where one is dangerously near the track or to have the car under the same degree of control as would be required in the latter case, will not constitute negligence.—*Perryman v. Chicago City Ry. Co.*, 242 Ill. 269, 89 N. E. 980, affirming 145 Ill. App. 187; *Cloud v. Alexandria Elec. Rys. Co.*, 121 La. 1061, 46 South. 1017, 18 L. R. A. (N. S.) 371; *Rollo v. City Elec. Ry. Co.*, 152 Mich. 77, 115 N. W. 727; *Graham v. Consolidated Traction Co.*, 64 N. J. Law, 10, 44 Atl. 964; *Holdridge v. Mendenhall*, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. Rep. 871. But this was an issue of fact presented to the jury in this case, and the finding was against the contention of the plaintiff in error.

It will be seen from a review of the authorities cited, that neither the trial court nor this court in the opinion, has extended nor enlarged the doctrine of degree of care required in such cases beyond that sustained and announced by the overwhelming weight of authority.

[No. 7653.]

CITY OF PUEBLO v. SMITH.

1. MUNICIPAL CORPORATIONS—*Duty as to Condition of Streets.* Municipal Corporations are required to construct their streets, and maintain them, under all circumstances, in reasonably safe condition for ordinary travel by those using due care in traversing the particular part of the highway which may be in question. Under no condition can a municipality be regarded as an insurer to those using the streets. (502)

2. NEGLIGENCE—*Unforseen Results.* Municipal corporations are required to guard against such dangers as can, or by the exercise of reasonable prudence ought to be anticipated; and where an accident happens to a traveler from some slight defect from which, according

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to common experience, danger is not to be reasonably anticipated, the municipality is not chargeable, e. g. where one, riding a bicycle over a viaduct, is thrown by reason of an inequality in the thickness of the planks by which the viaduct is covered, varying from one-fourth to three-fourth of an inch. (503)

3. NEGLIGENCE—*For the Jury*, as a rule; otherwise where the facts are not in dispute, or upon the evidence negligence or the absence of negligence is evident and unquestionable. (502)

Error to Pueblo District Court.—Hon. J. E. RIZER, Judge.

Mr. A. W. ARRINGTON, for plaintiff in error.

Mr. M. J. GALLIGAN, for defendant in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

Plaintiff Hugh M. Smith, a mail carrier in Pueblo, was returning to the post office on a bicycle, after his usual delivery of mail. Upon crossing Union Avenue viaduct, a general thoroughfare of the city, his wheel struck an obstruction in the floor; he fell and was injured; and for the injury sustained, he recovered judgment against the city for $5,000. It brings the case here for review.

1. There is no material dispute over the facts affecting the merits of the case. Union avenue, upon which there is constructed a viaduct about 400 feet in length and 32 feet wide, is one of the principal streets of Pueblo. In the latter part of 1909, it became necessary to refloor this viaduct, which was done with what is commonly termed three inch plank, which varied somewhat in thickness. These planks were laid lengthwise on the bridge, and this difference in thickness caused an unevenness in the floor where they came together varying in some places according to witnesses who measured the difference, from a quarter to three quarters of an inch.

The street car tracks cross this viaduct, and at the time of the accident, plaintiff was riding his bicycle be-

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tween the rails on one of the tracks. Hearing a car coming behind him, he attempted to ride off the track, and striking one of the raised edges of the plank, fell and was injured.

At the close of plaintiff's evidence, defendant asked the court to direct a verdict for the city, which motion was denied, and the error assigned on this ruling is the only one we will consider.

2. The question presented is, was it negligence on the part of the city to plank the viaduct in such a manner as to leave it in an uneven condition, and whether or not, under the undisputed facts the court should, as a matter of law, have determined this question in favor of the city.

The general rule applicable to this subject is, that cities shall construct and maintain the streets, under whatever circumstances may arise, in a reasonably safe condition for ordinary travel by those using in a proper manner, that particular part of the highway. Under no conditions can a municipal corporation be regarded as an insurer of the safety of those using the streets.—*Abbott on Municipal Corporations,* § 1024; *Boulder v. Niles,* 9 Colo. 415, 12 Pac. 632; *Denver v. Moewes,* 15 Colo. App. 28, 60 Pac. 986; *Beltz v. City of Yonkers,* 148 N. Y. 67, 42 N. E. 401; *Kelchner v. Nanticoke Boro.,* 209 Pa. 412, 58 Atl. 851.

3. As a rule, the existence of negligence is a question of fact for the jury; but it is otherwise when the facts are not in dispute, or where the negligence or its absence is evident and unquestionable.—*C. C. R. R. Co. v. Holmes,* 5 Colo. 205; *Jackson v. Crilly,* 16 Colo. 107, 26 Pac. 331; *C., B. & Q. R. R. Co. v. McGraw,* 22 Colo. 366, 45 Pac. 383; *Colo. & Southern Co. v. Reynolds,* 51 Colo. 231, 116 Pac. 1043; *Mau v. Morse,* 3 Colo. App. 362, 33 Pac. 283; *Cemetery Ass'n v. Davis,* 4 Colo. App. 572, 36 Pac. 911; *Thompson Co. v. Phillips,* 22 Colo App. 440, 125 Pac. 563.

It seems to us that the remarks of the court in *Beltz v. City of Yonkers, supra,* are peculiarly applicable to

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cases of this character. Justice O'Brien, speaking for the court, said: "Assuming that the defendant's officers were men of reasonable prudence and judgment, could they, in the reasonable exercise of these qualities, have anticipated this accident or a similar one from the existence of this depression in the walk? They could undoubtedly have repaired it at very little expense, but the omission to do so does not show or tend to show that they were negligent unless the defect was one of such a character that a reasonably prudent man should anticipate some danger to travelers on the walk if not repaired. If the existence of such a defect is to be deemed evidence of negligence on the part of a city, then there is scarcely any street in any city that is reasonably safe within such a rule, and when accidents occur the municipality must be treated, practically, as an insurer against accidents in its streets. The law does not prescribe a measure of duty so impossible of fulfillment or a rule of liability so unjust and severe. It imposes upon municipal corporations the duty of guarding against such dangers as can or ought to be anticipated or foreseen in the exercise of reasonable prudence and care, but when an accident happens by reason of some slight defect from which danger was not reasonably to be anticipated, and which, according to common experience, was not likely to happen, it is not chargeable with negligence."

In the case before us, to sustain the judgment, we must virtually say that every municipality must maintain its streets, bridges and viaducts not only in a reasonably safe condition for ordinary travel, but must use extraordinary precautions to maintain them free from all ruts, holes, projections, depressions or unevenness exceeding a difference of from half an inch to an inch and a half from the general surface of the street, or be compelled to respond in damages for any accident which might be occasioned by reason of such unevenness. The unreasonableness of such a rule is the best argument against it; it would be contrary to the well established principles of

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law on this subject, and we must decline to entertain such a proposition.

The judgment is reversed and the cause remanded with directions to dismiss the complaint.

Reversed and remanded.

CHIEF JUSTICE MUSSER and MR. JUSTICE SCOTT concur.

[No. 7658.]

KENEHAN V. STATE BOARD OF MEDICAL EXAMINERS.

1. STATE BOARD OF MEDICAL EXAMINERS—*Control of its Funds.* Section 4, c. 189 of the Laws of 1911 is not in conflict with Rev. Stat. § 6071. It is within the authority of the State Medical Board to determine, absolutely, what expenditure shall be made of the funds arising in the lawful discharge of its duties, subject only to the statutory requirement that at the close of each biennial period the balance shall be transferred to the General Fund of the State. These funds do not arise from any appropriation of the legislature, but from fees and fines collected by the Medical Board; and the Medical Board may withdraw such sums as are necessary to meet its obligations, either present or ensuing within the biennial period. But its financial affairs must begin with and be closed at the end of, each biennial period. It may not withdraw funds near the close of one biennial period, for the purpose of depositing them during a succeeding biennial period, to meet expenses during such succeeding period. This would defeat the clear purpose of the statute. (509, 511)

2. POWERS OF AUDITOR AND TREASURER. Shortly before the end of the biennial period in each of the years 1906 and 1908 the Medical Board had drawn large sums from the custody of the Treasurer, leaving, at least in one of those years, no money at all to the credit of the fund. December 31, A, D. 1910, the auditor, by an entry in his books, assumed to transfer from the fund, of the Medical Board, a sum, the exact amount of the money so withdrawn in 1906, 1908; this upon the belief or suspicion that the withdrawal and subsequent deposit of those sums was a mere subterfuge, to enable the Medical Board to retain these moneys within their own control, and thus defeat the statute; and upon the opinion that it was within both his power and duty to

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make such withdrawal and transfer, in order to defeat the supposed unlawful conduct of the Medical Board.

Held that while the facts set forth in the agreed case upon which the cause was submitted were sufficient to justify the suspicion of the auditor, the matter was not for his arbitrary determination; that the civil and criminal conduct of the members of the Medical Board are for judicial determination, after full hearing. (509, 510)

The duty of the State Treasurer in this respect is purely ministerial. The transfer to the General Fund directed by the statute must be made at the date prescribed and only to the amount in the custody of the Treasurer, at that date. The Treasurer has no power to make the transfer as of any other date, nor to review any of the official acts of the Medical Board. (509)

Error to Denver District Court.—Hon. CARLTON M. BLISS, Judge.

Hon. BENJAMIN GRIFFITH, Attorney General, Hon. CHARLES O'CONNOR, First Assistant Attorney General, for plaintiff in error.

Mr. HARRY E. KELLY and Mr. CHARLES H. HAINES, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an action in mandamus against the State Auditor and the State Treasurer to compel the issuance of state warrants in payment of certain accounts purporting to have been contracted and allowed by the State Board of Medical Examiners in the exercise of the power and authority of said board. These accounts are for the services of the secretary of the board, and other employees. The State Board of Medical Examiners, having been made a codefendant in the action, filed its answer admitting the allegations of the complaint, and demanding, in its own behalf, that the relief prayed for in the complaint be granted. At the time of the institution of this proceeding in the District Court, the plaintiff in error, Roady Kenahan, was State Auditor, and the defendant below, Michael A. Leddy, was State Treasurer, and for the of-

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ficial term prior thereto these offices were held by the same persons, but in reverse order. The total of the accounts involved is $600, and purport to have been for services performed within the biennial period ending November 30th, 1912, and the vouchers were executed and presented for payment within that period, with the exception of one voucher in the sum of one hundred dollars which purports to be for services rendered by Jane V. Barber, during the biennial period ending in 1910. The case was tried on an agreed statement of facts, in substance as follows: (1) That at the time of the filing of the suit, there was the sum of $597.92 only, in the custody of the treasurer belonging to the medical board fund; (2) that prior to the close of the biennial term ending in 1906, the sum of $469.31 was withdrawn by the medical board upon warrant, for the purpose of paying certain prospective expenses arising from pending litigation in which the board was involved in the course of its official duties; that at the close of said biennial period there was no money in said fund in the custody of the treasurer; (3) that shortly prior to the close of the biennial period ending in 1908, the sum of $140 was withdrawn from said fund, upon warrant, partly for the purpose of returning to unsuccessful applicants for license to practice medicine, and partly for expenses of litigation; (4) that in January, 1909, and during the biennial period ending in 1910, there remained in the hands of the board a balance of the sums so withdrawn of $597.92, and that this sum was at such time deposited with the state treasurer to the credit of the Medical Board Fund; that thereafter this sum of money so paid into the fund was frequently reduced below the amount of said deposit, upon the lawful withdrawals by the medical board; (5) that at the close of the biennial period ending in 1910, the books of the State Auditor showed the sum of $470.08 to be to the credit of the Medical Board Fund, but that prior to said date, vouchers in the total sum of $470 had been presented to the State Auditor, for which the said official had refused

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to honor or to issue his warrants; (6) that during the biennial period ending in 1912, and in the month of December, 1910, the sum of $680 was deposited to the credit of the said fund, but that thereafter, to-wit, on the 31st day of December, 1910, the State Auditor, by an entry on his books, purported to transfer the sum of $597.92 from said Medical Board Fund to the General Revenue Fund of the state.

The trial court ordered the issuance of the writ as prayed. It seems to have been the theory of the Auditor in this matter that, inasmuch as this last named sum was the exact amount remaining in the hands of the board as an unused part of the two withdrawals in 1906 and 1908, it was his duty, and within his power, to transfer that amount from the Medical Board Fund, to the General Revenue Fund, at the time and in the manner as stated. This action was based, apparently, upon the conclusion of the Auditor that these two sums so withdrawn and unused during the periods ending in 1906 and 1908, and the deposit thereafter of this portion of these unused amounts during the succeeding periods, was a subterfuge intended to prevent the same from being transferred, as provided by the statute, at the close of the biennial period, to the General Revenue Fund of the state.

The facts, as appearing from the agreed statement, are sufficient to justify a very grave suspicion of the truth of the conclusions reached by the State Auditor.

The powers and duties of the Board of Medical Examiners, as well as those of the state officers, involved, in so far as affected by the present case, are provided by section 6071 Rev. Stats., 1908, as follows:

"All fees received by the State Board of Medical examiners and all fines collected by any officer of the law under this act, shall be paid to the Secretary-Treasurer of said board, who shall, at the end of each and every month, deposit the same with the State Treasurer, and the said State Treasurer shall place said money so re-

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ceived in a special fund to be known as the Fund of the State Board of Medical Examiners, and shall pay the same out on warrants drawn by the Auditor of State therefor, upon vouchers issued and signed by the President and Secretary-Treasurer of said board. Said moneys so received and placed in said fund may be used by the State Board of Medical Examiners in defraying their expenses in carrying out the provisions of this act. At the end of every biennial period, if there shall remain in said fund any balance, said balance shall be transferred to the General Revenue Fund of the state. The Secretary-Treasurer of said board shall keep a true and accurate account of all funds received, and all vouchers issued by the board; and on the first day of December of each year he shall file with the Governor of the state a report of all receipts and disbursements for said board for the preceding fiscal year.

Members of the board shall receive a *per diem* for the time during which they shall be actually engaged in the discharge of their duties; and the Secretary-Treasurer shall receive a salary; said *per diem* and salary shall be fixed by the board, and together with all other expenses shall be paid out of the "Funds of the State Board of Medical Examiners."

It is admitted by counsel for the board that section 4, chapter 189, Laws of 1911, does not change or amend section 6071 Rev. Stats., 1908, but it is said that said section is a statutory construction of the latter section, and interprets the same as giving to the board, plenary power over its revenue. This section is as follows:

"Funds lodged with the State Treasurer under this act which are not creditable to the General Revenue of the State, and which have been or may be by law designated for purposes other than such General Revenue, shall not be deposited in the Treasury of the State or considered therein, but shall be held by the State Treasurer as custodian, separate and apart from such funds, and may be withdrawn from his custody, for the purposes and under the control of the officers now or hereafter

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vested with authority so to do, subject, however, to the requirement of vouchers and warrants, as above described."

Chapter 189, Laws of 1911, is an act, general in its character, intended to compel the deposit of all funds with the State Treasurer, whether belonging to the state, or to any institution, department, bureau, or officer, and providing a method for the withdrawal thereof in all cases. Said section 4 is not in conflict with the provisions of the medical board statute, but is in harmony with it. That section does not pretend to repeal the provisions of the medical act requiring the transfer, to the state, of the unused part of the medical board fund at the close of each biennial period.

Under these legislative acts, it is clearly within the power and authority of the Board of Medical Examiners to determine absolutely the question of expenditure of the funds arising within the lawful discharge of its duties, except only that in case of any balance remaining in the custody of the treasurer at the close of any biennial period, such balance shall be transferred to the General Fund of the state, and becomes the property of the state at that time. The treasurer has no other power or authority in this respect than to make the transfer of such funds, and only such funds, as shall appear to be in his custody at the close of a biennial period. These duties are purely ministerial, and the transfer provided must be made as of that date, and in the amount in the custody of the treasurer on such date. The fact in this respect, as disclosed by the record, must control. These funds do not arise from any appropriation by the legislature, nor from receipts by the state from any source, but from fees and fines collected by the State Board of Medical Examiners, and the disposition of which is entirely within the judgment, discretion and control of such board, except only that all must be deposited with the state treasurer in a specifically named fund at the close of each month, and to be withdrawn therefrom upon the order of the board alone. The Treasurer has but one act to otherwise per-

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form in relation to such fund, and that is to transfer the balance in such fund remaining at the close of the biennial period. He has no power to make this transfer as of any other date, nor is he given any authority or power to in any manner review or pass upon any of the official acts of the board. The statute confers upon the board exclusive powers not only in this matter, but in all others covered by the statute creating the board of medical examiners. The members of this board are made public officials, and must be presumed to have discharged their duties honestly and within the scope of their authority. The balance referred to does not become the property of the state until the very close of the biennial period, and then to the extent and in the amount at that time within the custody of the treasurer. It may be that the Board of Medical Examiners has in this case exceeded its powers, or abused its discretion, or that it has wilfully violated the law and abused the trust imposed, and that in so doing it has deprived the state of a sum of money rightfully belonging to it under the law; but this is not a matter for the arbitrary determination of the State Auditor, to be disposed of by an entry on his books. The powers, duties, conduct and integrity of public officials are not to be so judged. The members of this board are answerable for their official conduct to the chief executive of the state, and their civil or criminal liability is a question for judicial determination, upon a full and complete hearing in the light of the law, and the facts appearing. It would seem that the clear intent of the statute is that the board shall deposit all its receipts with the State Treasurer at the end of each month, and that it may withdraw from the treasury such sums as may be necessary to meet its fixed obligations, either contracted or performed, within a given biennial period, but that its financial affairs must be closed at the end of each of such periods, as in case of other state officers, so that the definite amount, if any, which shall then become the property of the state may be determined and transferred to the state fund. Clearly, the board may not withdraw such funds at a

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time near the close of one biennial period, for the purpose of again depositing the same during a succeeding biennial period, to defray expenses and obligations occurring in and during such succeeding period. Such action would be nothing less than to defeat the language and purpose of the statute, and to thereby deprive the state of its lawful due, and to which it is, in reason and by statute, entitled for its expense and service in the matter of supervision. But the agreed statement of fact does not justify such conclusion in this case, whatever may be the facts otherwise existing.

The said voucher for one hundred dollars for services rendered during the biennial period of 1910, and for reasons stated in this opinion, cannot be allowed and must be excluded from the judgment. So modified, the judgment of the District Court is affirmed.

En banc.

White and Hill, JJ., dissenting.

[No. 7676.]

Fox v. Denver City Tramway Company.

1. Pleadings.—*Construction.* A complaint for negligence in general and comprehensive terms, capable of being readily understood, and not so general as to mislead, is not subject to a general demurrer; nor to a special demurrer for ambiguity in failing to state with particularity the manner in which defendant was negligent, or the like. (517)

2. ——*Construed.* Action for causing the death of plaintiff's husband by the negligent operation of a street railway car. The complaint alleged that at or about the place where deceased attempted to board the car, defendant had placed a sign "Cars Stop Here"; that while the car was approaching the place of the sign "at a comparatively slow rate", deceased signalled the motor-man, in the usual manner, to stop the car; that when the car reached him deceased "attempted to board it in the usual manner; that defendant well knowing that deceased was about to board said car, negligently failed to stop the car, but con-

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tinued the motion thereof, and negligently increased its speed, whereby without negligence on his part deceased was violently thrown off said car." *Held* that the word "attempted", considered in connection with the context, clearly indicates a physical act; and because it is alleged in the same sentence that deceased was violently thrown off etc., the allegation "was about to board said car" plainly means "was in the act of etc." and not a mere mental purpose or intent; that the gist of the complaint is that defendant knowing that deceased was in the act of boarding the car, negligently increased its speed, with the result complained of. (513-517)

An objection that the complaint fails to state how defendant's negligence was the direct and proximate cause of the injury was *held* sufficiently answered by the allegation; "whereby deceased was violently thrown off said car." (516)

The manner in which deceased attempted to board the car was held to be sufficiently alleged, because "the usual manner" of boarding a car may be said to be a matter of general knowledge. The allegation that the car was approaching "at a comparatively low rate of speed" *held* to import that a person of ordinary prudence might attempt to board it with a reasonable probability of safety, and further that the allegation relates to a manner peculiarly within the knowledge of defendant, and for this additional reason the facts were sufficiently alleged. (516, 517)

3. ——*Special Demurrer, and Motion to Make more Specific* are substantially concurrent remedies. (517)

Error to Denver District Court.—Hon. HARRY C. RIDDLE, Judge.

Mr. CARLE WHITEHEAD and Mr. ALBERT L. VOGL, for plaintiffs in error.

Mr. GERALD HUGHES, Mr. HOWARD S. ROBERTSON, Mr. FREDERICK P. SMITH, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

On April 20th, 1911, the plaintiff, plaintiff in error here, filed an amended complaint against the defendant, defendant in error here, alleging, in substance, that she is the widow of one Julius A. Fox, who was killed on the

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5th day of June, 1910, whilst attempting to board a street car on Sheridan Avenue between Broadway and South Lincoln Avenues, in the town of Englewood; that the street car in question was being operated by and under the control of the defendant, which is a domestic street railroad corporation; that at or about the place where deceased attempted to board such car the defendant had placed, and on the day of the accident was maintaining, a public sign bearing the word "Cars Stop Here", or similar words, being such a sign as is used by the defendant, in Denver and Englewood, to designate the places where it will stop its cars to take on and let off passengers; that the deceased went upon Sheridan Avenue and signaled in the usual manner to the motorman to stop the car for him to board it; that when deceased first signaled the car was coming around the corner from South Lincoln Avenue onto Sheridan Avenue, approaching the "Cars Stop Here" sign; and "'was traveling at a comparatively low rate of speed"; "that when the car so signaled by deceased reached him he attempted to get aboard thereof in the usual manner, but the defendant, its servants, employees or agents, well knowing that deceased was about to board said car, negligently and carelessly, and in disregard of the aforesaid sign, and in disregard of the signal of deceased, as aforesaid, and in disregard of the attempt of the deceased to board said car as aforesaid, failed to stop said car, and on the contrary negligently and carelessly continued said car in motion, and negligently and carelessly increased the speed of said car instead of slacking it, whereby, and without any negligence on his part, deceased was violently thrown off said car, and precipitated against said car and against the trailer attached thereto, and was violently thrown to the ground, and was thereby so crushed, wounded, mangled and bruised that he died within a few minutes thereafter from the effects thereof"; "that when deceased signaled to the motorman to stop said car as aforesaid he * * * was in front thereof and near the

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track upon which said car was running, and so near to the sign above mentioned that if said motorman had stopped said car at the place as indicated by said sign, deceased would have been able to board said car thereat in the usual and ordinary manner while so stopped"; that it was defendant's duty upon being signaled by deceased to stop the car at the place designated by the sign to afford him a reasonable opportunity to get aboard thereof, but that defendant disregarded its duty, and negligently failed and refused to stop the car; and that by reason of the matters alleged plaintiff has been damaged in the sum of five thousand dollars.

Defendant demurred to the amended complaint on two grounds: 1. That it does not state facts sufficient to constitute a cause of action. 2. That it is "ambiguous, uncertain and unintelligible, and particularly in failing to state specifically in what manner and respect the defendant's agents and servants in charge of its car were guilty of negligence, and also in what manner and respect said negligence, if any, on their part was the direct and proximate cause of said accident; and also in failing to specifically allege in what manner and respect the deceased was endeavoring to board said car, and whether said car, at the time the deceased attempted to board the same, was then and there in motion, and if so, at what speed the same was moving." The demurrer was sustained and plaintiff elected to stand upon the amended complaint. Judgment was entered for defendant, which the plaintiff brings here for review.

Upon the authority of *McGonigle v. Kane*, 20 Colo. 292, 38 Pac. 367, the complaint clearly states a cause of action, and was not vulnerable to general demurrer. See also *Adams Express Co. v. Aldridge*, 20 Colo. App. 74, 77 Pac. 6, and *Wilson et al. v. D. S. & P. P. R. R. Co.*, 7 Colo. 101, 2 Pac. 1. The rule applicable on this proposition is well stated in *Downey v. Colorado Fuel & Iron Co.*, 48 Colo. 27, 108 Pac. 972, as follows:

> "The rule is, if the facts alleged, with all fair and reasonable deductions which may be drawn

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therefrom, are sufficient to state a cause of action, the complaint must be upheld as against general demurrer. Such is the settled doctrine of this court. —*Insurance Company v. Bonner,* 24 Colo. 222, 49 Pac. 366."

A careful analysis of the complaint discloses that the objections urged by special demurrer are not well taken. The first assignment is that it fails to state specifically the manner and respect in which defendant was negligent. The allegations of the complaint to this point are "that when the car so signaled by the deceased reached him he attempted to get aboard thereof in the usual manner, but the defendant, its servants, employees or agents, well knowing that deceased was about to board said car, negligently and carelessly * * * failed to stop said car, * * * and negligently and carelessly increased the speed of said car instead of slacking it, whereby, and without any negligence on his part, deceased was violently thrown off said car; * * * that when deceased signaled to the motorman to stop said car as aforesaid he * * * was in front thereof and near the track upon which said car was running and so near to the sign above mentioned that if said motorman had stopped said car at the place as indicated by said sign, deceased would have been able to board said car thereat in the usual and ordinary manner while so stopped." The word "attempted", as used in the first allegation, clearly indicates a physical act, and the word "about", as there used, considered in connection with the context, plainly means "in the act of", no mere mental purpose or intent, for it is stated in the same sentence that deceased "was violently thrown *off* said car," thus showing actual contact with the car by deceased while attempting to board it. If it be assumed that the defendant was guilty of negligence in failing to stop its car upon signal of the deceased at the place designated by the sign as a regular stopping place, thus affording an opportunity to board it, this was not such negligence as would support an action for injury to the person. It

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follows that the only act of negligence upon which recovery if supported by proper proofs, may be had in this case is that of carelessly accelerating the speed of the car, knowing that deceased was attempting to board it. The allegation upon this point is specific and definite charges how and in what respect the defendant was negligent. The gist of it is that defendant, knowing that deceased was in the act of boarding the car, *i. e.*, had taken hold of it, negligently increased the speed thereof with the result that deceased, because of such increased speed, was thrown from the car and killed.

The second objection is that it fails to state how defendant's alleged negligence was the direct and proximate cause of the injury. The allegation of the act of negligence in accelerating the speed of the car is followed by this averment: "whereby, and without any negligence on his part, deceased was violently thrown off said car", that is, the acceleration of the speed of the car is the negligence directly and specifically charged as the proximate cause of the injury of which complaint is made.

The third ground, that the manner in which deceased attempted to board the car is not alleged with sufficient definiteness, is likewise untenable. The allegation against which it is directed is that deceased "attempted to get aboard thereof (the car) in the usual manner". The usual manner of boarding a street car may be said to be a matter of general knowledge, and in this character of case, where the accident resulted in the immediate death of the party, it is undoubtedly true that everything within the plaintiff's knowledge has been alleged with as reasonable certainty as possible. Under the circumstances of this case, to compel plaintiff to allege whether the deceased took the initial step with the right or left foot, and simultaneously grasped the handles of the car with one or both hands, or was facing in a particular direction, would be in effect to practically require the impossible.

The last objection, that there is a failure to allege whether, at the time deceased attempted to board the car,

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it was then and there in motion, and if so, at what speed it was moving, may be disposed of substantially the same as the preceding objection. It is alleged that the car "was traveling at a comparatively low rate of speed". This shows that the car was in motion, and the expression "at a comparatively low rate of speed" was, under the circumstances, equivalent to stating that the rate of speed was sufficiently low to warrant a person of ordinary prudence in attempting to board it with reasonable probability of safety. The allegation clearly pertains to a matter peculiarly within the knowledge of the defendant and the facts were therefore sufficiently stated.

The following authorities are to the effect that when an allegation is in general and comprehensive terms, capable of being readily understood by defendant and not so general as to be misleading, it is not subject to the sort of objection urged: *DuBois v. First National Bank,* 43 Colo. 401, 403, 96 Pac. 169; *National Fuel Co. v. Green,* 50 Colo. 307, 313, 115 Pac. 709; *Union Gold Mining Co. v. Crawford,* 29 Colo. 511, 517, 69 Pac. 600; and 6 Ency. Pl. & Pr. p. 271, and notes. This rule is especially applicable to the situation here presented, and the amended complaint shows a fair and reasonable compliance with it.

In the case of *Adams Express Co. v. Aldridge, supra,* substantially the same objections were interposed to the complaint by motion to make more specific, under § 60 *Mill's Ann. Code,* and overruled. That decision is in point here, because the reasoning which would support a certain conclusion as against the motion would be equally applicable to a special demurrer interposed on like grounds, the two being essentially concurrent remedies.—*Orman v. Mannix,* 17 Colo. 564, 30 Pac. 1037, 17 L. R. A. 602, 31 Am. St. Rep. 340; *Hall v. Cudahy,* 46 Colo. 324, 104 Pac. 415; *Michael v. Mills,* 22 Colo. 439, 45 Pac. 429; and 6 Ency. Pl. & Pr. p. 273. The rule applicable is stated in that case, citing *Wilson v. Railroad Co.,* 7 Colo. 101, 2 Pac. 1, and other authorities in support thereof, and may be gathered from the following quotation:

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"But, unless the facts which the motion demanded were within the knowledge of the plaintiff, they could not have been stated; and to require their statement would have been to require an impossibility. The driver might have been asleep; or, instead of looking before him, or observing what was in his way, his attention might have been fixed on some object in another direction; or he might have been heedless generally, and oblivious to his surroundings. Such things as these, and other possible elements of negligence on the part of the driver, if they existed, the plaintiff could not be supposed to know. Presumptively, it was not within her ability to furnish the specific facts for which the motion called; and any attempted explanation by her of the negligence, would have been based on conjecture. But if she had undertaken to specify particular acts of negligence, she would have been confined in her proofs to those acts; so that, in case of mistake in her allegations, she would have been driven out of court, even if her cause was meritorious.—*Ry. Co. v. Younger,* 10 Tex. Civ. App. 141 [29 S. W. 948]; *Wallace v. R. R. Co.,* [Tex. Civ. App.] 42 So. 865."

The complaint under consideration is more direct and specific and much fuller in its allegations than the one approved in that case. Moreover, in view of the fact that this is an action by the widow, the death of whose husband occurred within a few minutes after the accident, the allegations complained of seem, upon the whole, quite as definite and certain as plaintiff could reasonably be expected or required to make.—*Chicago City Ry. Co. v. Jennings,* 157 Ill. 274, 41 N. E. 629.

The court erred in sustaining the demurrer to the complaint and dismissing the action. The judgment is reversed and cause remanded with directions to permit the defendant to answer as it may be advised.

Judgment reversed and cause remanded with directions.

Chief JUSTICE MUSSER and Mr. JUSTICE WHITE concur.

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[No. 7722.]

PONDER v. ALTURA FARMS COMPANY.

1. FRAUD—*Ratification.* One who having been induced by fraudulent and false representations to enter into an executory contract, insists upon the performance thereof after he has full knowledge of the facts constituting the fraud, thereby ratifies the contract, condones the fraud, and is barred of an action for the damages resulting therefrom. (522)

The ratification takes effect from the date of the contract and purges it of the fraud. (524)

2. ——*Without Damage*, not actionable. (527)

3. MAXIMS—*Volenti non fit injuria*, applies to all loss resulting from the voluntary execution of a non-obligatory contract, with full knowledge of the facts which render the contract unenforceable. (527)

Error to the Denver District Court.—Hon. H. C. RIDDLE, Judge.

Messrs. MELVILLE, SACKETT & CALVERT, for plaintiff in error.

Messrs. DOUD & FOWLER, and Mr. C. H. WINGENDER, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court.

This is an action by the plaintiff in error, to recover in damages for fraud and deceit alleged to have been practiced by the defendant in error, in inducing the former to enter into a contract for the purchase of a tract of land.

The Altura Farms Company was the owner of several hundred acres of land which it had divided and platted into ten-acre tracts. The contract in question was for one of these tracts, and purports to have been executed on the 16th day of August, 1909. In this the

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agreed purchase price was $2000, to be paid as follows: $10 cash in hand; $40 on the first day of September, 1909, and $10 on the first day of each succeeding month until the entire purchase price was paid; all deferred payments to bear interest at the rate of six per sent per annum. The allegations in the complaint as to the fraud, were as follows:

> "That plaintiff was induced to enter into said contract by the false and fraudulent representations made by defendant company through certain advertisements, including those in 'The Rocky Mountain News' and 'The Denver Post,' stating in substance that these tracts were located seven miles due east of the capitol building; that the purchase price included a full perpetual water right; that the ditches were all completed, and the soil guaranteed to be the best in Colorado; and that in other advertisements it was stated in substance that every tract offered for sale was under a ditch and well irrigated, and the water rights were perpetual; that with each acre sold was delivered one right equal to an acre-foot of water, which would cover all needs for all times and for every kind of crop.
>
> That, in addition to said advertisements, he was further induced into said contract by H. Pike, assistant manager in the office of defendant, to whom he had stated that he knew practically nothing about the value of land, or the amount of water necessary to irrigate the same, and who told plaintiff that defendant company owned said lands and had ample water for irrigating all kinds of crops and trees that might be planted thereon; that the ditches were all completed, and Tract No. 48 lay under one of them; that, in addition to a plentiful supply of water from the High Line Canal, defendant also owned at said time a reservoir with eighty thousand acre-feet of water stored therein which would be drawn upon, and water furnished to purchasers of said lands and water, including Tract No. 48, whenever asked for and needed by them for irrigation; that defendant had sufficient water, if it did not rain for three years, to irrigate all the lands sold by it; that the beauty

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of defendant's irrigation system was that the purchasers of water rights could get water at any time of the day or night every day in the week; that said reservoir held thirty thousand acre feet more than they intended to sell, and that the water rights were perpetual and consisted of one acre foot for each acre of ground, which would cover all needs for all time; that Altura Farms, including Tract No. 48, were located seven miles from the capitol building in Denver and were within two miles of the end of the car line at Aurora; that the tramway company had a franchise to build its line out to Watkins, and in order to hold it would be compelled to build as far as Altura by June, 1910; that the soil on said lands was from three to ten feet in depth, and that the best drinking water on earth could be obtained on said farms, including Tract No. 48, at from thirty to forty feet in depth; that Tract No. 48 was particularly adapted to the raising of all kinds of fruit, grains and vegetables, particularly potatoes; that said Altura Farms were worth more than two hundred dollars an acre, and similar lands to these were being, and had been, sold at an equal distance from Denver, for from three hundred dollars an acre and upwards; that plaintiff by cultivating said lands would be absolutely sure of netting himself at least two thousand dollars on said tract, because the certainty of the water right would insure a full crop each year; and that if through sickness or a failure of crops he could not meet his payments, the same would be carried over for him."

It was further alleged that these representations were false and known to be so by the Altura Farms Company, and that the plaintiff was ignorant of such matters and wholly relied on the alleged false representations so made.

The answer was a general and specific denial of the frauds charged. The trial court at the close of plaintiff's testimony directed a verdict for the defendant.

Inasmuch as the case must be determined upon another question, it is not necessary to enter into a dis-

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cussion and determination of the many interesting questions as to whether or not the charges of fraud in the complaint, or any of them, constitute actionable fraud, or whether in such case the proof is sufficient to justify a finding for the plaintiff.

It appears that plaintiff inspected the land at least three times before entering into the contract of purchase, twice he was taken out from the city by the defendant in an automobile, and once he walked out, accompanied by his wife. In the spring of 1910, he planted the tract or a part of it, to crops and trees and by reason of it being a dry year, and because of the shortage in water for irrigation, the crops failed and many of the trees died.

We think that the contention of the defendant in error, to the effect that if the fraud be admitted, and, if after full knowledge of the facts alleged, to constitute the fraud, the plaintiff insists upon a performance of such an executory contract, he thereby ratifies the contract and condones the fraud, and for such reason is barred from a recovery for damages on account of the fraud, is well sustained by the authorities.

The following admission by the parties is found in the record:

> "That it is admitted by both plaintiff and defendant that the payments called for by the contract between The Altura Farms Company and Mr. Ponder have been continuously made up to the time of the bringing of this suit and until now all payments have been continued and made by the plaintiff and accepted by the defendant; that on the first of November, 1910, Mr. Ponder made an application to the defendant for extension of the time for the payment of certain interest, which was then due, which time was extended from November 1st to December 30th, at the request of the plaintiff, and granted by the defendant; that the extension was evidenced by check executed and delivered on the 1st of November, but which bore date, the 30th of December, 1910, that shows the extension of the time of payment."

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The complaint was filed on the 7th day of December, 1910. Plaintiff must have had full knowledge of all the facts constituting the alleged fraud at that time but he insisted on making the payments, and did so up to that time. The judgment was rendered September 22d, 1911, and the stipulation shows that he had voluntarily made all payments due under the contract at that date.

It further appears from the stipulation that just prior to the filing of his suit, plaintiff made an application for extension of time for the payment of certain interest, which was granted, and which he paid December 30th, 1910, and after the suit was filed.

The plaintiff testifies that he began his investigation of the water supply in the spring and summer of 1910, and indeed, it is not contended that he did not have knowledge of the alleged fraud long prior to the institution of the suit and that after such knowledge was obtained, and continuously since that time has made all payments on the contract as they became due, and insists on so doing, and in the full performance of his contract. It is quite clear also, that at the time of the trial he was in possession of the land and claiming the right thereto under the contract which he claims was induced by the alleged fraud.

It is the settled rule that one who has been induced, through fraud to enter into a contract has the election either to rescind, tendering back that which he has received, or affirming the contract he may have his action for deceit to recover damages. But the affirmance so referred to can have relation only to the completed transaction, and that if he become advised of the fraud perpetrated upon him in time to recede from his agreement, and yet, when with knowledge of the falsity of the representations which has induced the contract, elects to perform, and clearly manifests his intention to abide by the contract, he condones the fraud and may not recover. It has been held that the contract, being against conscience because of the fraud, is not obligatory upon him if he so elects; but if, when fully informed of the

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fraud, he voluntarily confirms, ratifies and performs, and exacts performance of the contract, he condones the fraud, and that such ratification, like the ratification of an unauthorized act of an agent, relates to the time of the contract, confirming it of its date and purging it of fraud. Further, that with respect to an executory contract, one may not after the knowledge of the fraud, continue to carry it out, exacting performance from the other party to it, receive its benefits, and still pursue an action for deceit; and this because continued execution with knowledge of the fraud, signifies the ratification of a contract voidable for fraud, and so condones the fraud.

This was the doctrine announced by the United States Circuit Court of Appeals in the case of *Kingman & Co. v. Stoddard,* 85 Fed. 740, 29 C. C. A. 413. In the opinion in this case will be found a most exhaustive review of the authorities upon this question. It was there said:

> "With respect to an executory contract voidable by reason of fraud, the defrauded party, with knowledge of the deceit practiced upon him, may not play fast and loose. He cannot approbate and reprobate. He must deal with the contract and with the wrong doer at arm's length. He may not, with knowledge of the fraud, speculate upon the advantages or disadvantages of the contract, receiving its benefits, and at the same time repudiate its obligations.—*Grymes v. Sanders,* 93 U. S. 55, 62 [23 L. Ed. 798]; *McLean v. Clapp,* 141 U. S. 429, [35 L. Ed. 804] 12 Sup. Ct. 29."

In further discussing the rule and the reasons for it, the court said:

> "The thought is well expressed in *Solway v. Fogg,* 5 Mees. & W. 83-85, where Lord Abinger, C. B., said: 'Secondly, it was clear upon the evidence that the plaintiff had full knowledge of all that constituted the fraud in this case either before or during the work, and as soon as he knew it he should have discontinued the work and repudiated the contract, or

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he must be bound by its terms.' And Parke, B., said: 'I also think that upon discovering the fraud (unless he meant to proceed according to the terms of the contract) the plaintiff should immediately have declared off, and sought compensation for the by-gone time in an action for deceit. Not doing this, but continuing the work, as he has done, he is bound by the express terms of the contract, and, if he fail to recover on that, he cannot recover at all.' And why not? Fraud is indeed odious, and should be condemned; but why should the defrauded party, with knowledge of the wrong perpetrated upon him, be permitted to speculate upon the wrong, enhancing the injury if the speculation prove disastrous? Why should the wrongdoer be mulcted in damages which the defrauded party has with knowledge of the fraud brought upon himself? Why should the latter be permitted to refer the injury which he has incurred with his eyes open to the original wrong by which he was induced to execute a contract which could not be enforced against him? Suppose, for example, that one, through false representations, be induced to enter into contract to furnish the plant necessary to the operation of a mine, and to agree to expend in its development, say not less than $100,000 per annum for the term of five years; there is neither sense nor justice in holding that, after discovery of the fraud, he may continue to carry out the contract, to advance large sums of money in its performance, and, when disaster has come upon the enterprise, he may look to the original wrongdoer for reimbursement for the loss voluntarily incurred. Cases may possibly arise where the defrauded party may, by reason of the wrong, be unable to recede from his situation without prejudice. A proper rule will doubtless be found to govern such cases when they arise. But where he can safely retreat we think he should, as Judge Bronson expresses the thought, 'decide whether he will stop short or go on.' ''

In *Grymes v. Sanders,* 93 U. S. 55, 23 L. Ed. 798, it was held that

"Where a party desires to rescind, upon the ground of mistake or fraud, he must, upon the dis-

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covery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract, as if the mistake or fraud had not occurred."

This doctrine was reiterated and the rule reaffirmed in *McLean v. Clapp, supra.*

The instant case cannot be said to be stronger than that stated by Judge Lurton in the case of *Simon v. Goodyear Metallic Rubber Shoe Co.,* 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745;

"The case for the plaintiff, in its most favorable showing, may be thus stated: 'The defendant has deceived and beguiled me into a contract which I would not have made but for reliance upon the wilfully false statements of its agent, made to induce its execution. I discovered its deceit after beginning its execution. I could have stopped then, for the engagement was not obligatory, and by far the greater part of my contract was still executory. If I had stopped purchases and deliveries when I acquired full knowledge of the falseness of its representations, my loss would have been limited to the difference between the price I had paid for the rubber waste I had theretofore delivered and the price I received under the contract, and this loss I might have recovered in an action for deceit. But when I discovered the deceit I sought to be relieved in whole or in part from its further execution, and appealed to the defendant to make concessions. The defendant denied the deceit and demanded full performance, granting me only an extension of time for performance. In this situation, with full knowledge of the deceit, I accepted this concession in respect of time of performance, but notified it that I would hold it liable for the loss I should incur in buying to fill my contract when it should be fully performed, and went ahead and executed the contract according to its terms. Defendant has paid me the price it agreed to pay, but I now demand the damages I have incurred in carrying out the contract according

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to its terms.' There can be but one answer to the case thus stated. The contract was not obligatory by reason of the deceit by which it was procured. If it had been fully executed before full knowledge of of the deceit which made it non-obligatory, the plaintiff's remedy would have been in an action for the deceit. In such action the measure of damages would not be the value of the contract if the representations which induced it had been true, but the loss which was incurred by reason of its execution. What the plaintiff might have gained would not have been recoverable, but only the loss which he sustained by its actual execution."

After stating the rule of damages in such a case, that great jurist further continuing, said:

"This being the rule of damages in an action by one who has been fraudulently induced to make either a contract of sale or purchase, it must follow that if one, after full knowledge of the fraud and deceit by which he has been induced to make a sale of property, goes forward and executes it notwithstanding such fraud, the damage which he thereby sustains is voluntarily incurred. The maxim *Volenti non fit injuria* has application to all loss resulting from the voluntary execution of a non-obligatory contract with full knowledge of the facts which render it voidable. Fraud without damage is not actionable. If the fraud be discovered while the contract is wholly executory, the party defrauded has the option of going on with it or not, as he chooses. If he executes it, the loss happens from such voluntary execution, and he cannot recover for a loss which he deliberately elected to incur."

In *Hunt v. Hardwick* Co., 68 Ga. 100, the court said:

"Apart from the evidence submitted on the part of the plaintiff below, it must be borne in mind that this contract, which it is alleged was induced by fraud and false representation in two very material facts, was, so far as the record shows, not complained of when these false representations were discovered, but with full knowledge of their falsity,

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> if they existed, defendant below went forward and made payments on said note years after it matured and thus seemingly acquiesced in and ratified the alleged contract made. It is a well settled rule that a party who is entitled to rescind a contract on account of fraud or false representations, when he has full knowledge of all the material circumstances of the case, if he freely and advisedly does anything which amounts to the recognition of the transaction, or acts in a manner inconsistent with its repudiation, it amounts to acquiescence, and though originally impeachable, the contract becomes unimpeachable even in equity. *Kerr on Fraud and Mistake,* 301-2-5; *Cozart v. Georgia Co.,* 54 Ga. 384; *Gamble v. Knott,* 48 Ib. 109; *May v. Memphis Co.,* 40 Ib. 190."

It was held in *St. John v. Hendrickson,* 81 Ind. 350, that:

> "Where one is induced by fraud, in the form of false representations, to enter into a contract, and afterwards, upon obtaining full knowledge of the fraud practiced upon him, and of all material facts, declines to repudiate it, and expressly ratifies it, he can neither rescind nor maintain an action for damages."

Upon the foregoing authorities and upon principle we we think the acts of the plaintiff in this case constitute a waiver of the alleged fraud, and an abandonment of the claim for damages. At the institution of this suit the plaintiff had paid but $190 of the sum of two thousand dollars agreed in the contract. It was his clear duty at that time, after full knowledge of the acts of fraud, if there was fraud, to have abandoned the contract and to have brought the proper action for the damage he had then sustained. He cannot insist upon the continuance of a contract covering a long future period and at the same time claim damages for the fraud that induced it.

In the language of some of the authorities he must either stop or go on with the contract. It is manifestly unjust that he should be permitted to do both.

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We have not overlooked the rule stated by Judge Cooley, and adopted in 20 Cyc., 93:

> "That acts done in affirmance of the contract can amount to a waiver of the fraud only where they are done with full knowledge of the fraud and of all material facts, and with intention clearly manifested to abide by the contract and waiving all right to recover for the deception."

For it is very clear that the acts of the plaintiff were within that rule. The plaintiff in error admits that there is no Colorado case directly in point but cite the following as tending to support his contention: *Lilley v. Randall,* 3 Colo. 298, 300; *Herfort v. Cramer,* 7 Colo. 483, 489, 4 Pac. 896; *Wheeler v. Dunn,* 13 Colo. 428, 445, 446, 22 Pac. 827; *Butler v. Rockwell,* 14 Colo. 125, 139, 23 Pac. 462; *Florence O. & R. Co. v. McCandless,* 26 Colo. 534, 537, 58 Pac. 1084. We have examined these cases and find nothing which appears to be in conflict with the principle here announced.

The judgment is affirmed.

MUSSER, C. J., and GARRIGUES, J., concurring.

[No. 8003.]

THE FIRST NATIONAL BANK OF DENVER v. CONE, EXECUTRIX.

1. EXECUTORS AND ADMINISTRATORS—*Exhibition of Claims*—If the claim is based upon a promissory note, the note itself must be presented and filed in the court. Rev. Stat. § 7212. (531, 532)

2. ——*Waiver.* The endorsement of the word "disallowed", by the executrix upon a claim founded on a promissory note, and not exhibiting the note, is no waiver of the omission to file the note. (531)

3. ——*Objections to Claim,* need not be specified. (531)

4. PLEADINGS—*Construed.* A claim upon a promissory note being exhibited against the decedent's estate, the executrix files her bill in

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equity against the payee, and other subscribers to the note, asserting that decedent subscribed, merely as surety. The filing of the claim was admitted, but there was no admission that the note had been filed or exhibited. *Held* she was not estopped to plead the limitation declared in Rev. Stat. § 7206. (531)

Error to Fremont District Court.—Hon. CHARLES A. WILKIN, Judge.

Mr. JAMES GRAFTON ROGERS, Messrs. ROGERS, SHAFROTH & ROGERS, for plaintiff in error.

Messrs. TAYLOR & TAYLOR, for defendant in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

1. The facts are contained in a stipulation between the parties substantially as follows: In 1905, James J. Cone and James H. Peabody were interested as owners and officers in the First National Bank of Canon City. Among the bank assets was listed some paper to which the examiner objected. To meet this objection Cone, Peabody and others borrowed $10,000 from the First National Bank of Denver, (plaintiff in error) giving their notes therefor dated April 1, 1905. Cone died August 13, 1905. September 5, 1905, Annie E. Cone, his widow, (defendant in error) was appointed executrix of his estate. October 27, 1905, plaintiff in error filed a claim in the county court against his estate on account of the note. The original note was not presented or exhibited as the statute requires until September 6, 1911. On or about November 7, 1905, the executrix endorsed on the claim as filed, the following words: "This claim is disallowed." February 14, 1906, Mrs. Cone as executrix brought an action against the other signers of the note, the First National Bank of Canon City and the First National Bank of Denver, in which she alleged that Mr. Cone signed the note as surety only, and that the First National Bank of Denver should enforce whatever right

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it had on account of the note, against the First National Bank of Canon City, which, she alleged, was the real principal. That action was determined against her, both in the district court and in this court on appeal. (See *Cone v. First National Bank,* 48 Colo. 485). A hearing on the $10,000 claim against the estate was then had in the county court where a defense was presented that the claim was barred by the statute of non-claims, the note not having been filed within the statutory period of one year after the granting of letters testamentary. The county court adopted this contention and disallowed the claim. On appeal, the district court entertained the same view as to the law, and plaintiff in error brings the case here for review.

2. Plaintiff in error admits that the note was not exhibited to the probate court within one year from the time of granting the letters; but contends that the executrix by her pleadings in the independent action brought by her in the district court, and by statements of her attorneys in certain letters written by them in connection therewith, is now estopped from setting up the defense presented to the claim. Even though an executrix may waive the statute of non-claim, which we do not determine, there is nothing in the record to justify such a position. True, in the pleadings in the action commenced in the district court, and in the correspondence, the executrix by her attorney stated that a claim had been filed in the county court based upon this note; but there is no statement or admission that the note was exhibited. The executrix resisted the claim and endorsed it "disallowed", and at all times insisted it should not be allowed against the estate. This was sufficient. It was not necessary that she specify her objection; any objection to its allowance could be orally interposed at any time before or at the hearing.—*Hobson v. Hobson,* 40 Colo. 332-338, 91 Pac. 929; *Altvater v. National Bank,* 45 Colo. 528-531, 103 Pac. 378.

The statute provides the method for exhibiting claims against estates. Its language is clear, explicit and unam-

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biguous. If any hardship has resulted to plaintiff in error, it is because of its failure to avail itself of these provisions, and not owing to any act or conduct on the part of the executrix.

The note was not filed in the proper court within one year from the time of granting the letters and is barred by the statute of non-claims.—*Hobson v. Hobson, supra; Gordon-Tiger Co. v. Loomer,* 50 Colo. 409.

The judgment of the lower court is affirmed.

Affirmed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT concur.

[No. 8051.]

INLAND BOX AND LABEL COMPANY v. RICHIE.

1. CONTRACT—*Construed*—Plaintiff's Assignor, in February, entered into a contract to furnish defendant a horse to be used in a delivery wagon, the use of the horse to be paid for monthly at a specified rate. In May of the same year the assignor refused to furnish the horse. *Held* that the contract was to run from month to month, and the violation thereof defeated the plaintiff's action on a prior assignment of whatever might be or become due thereunder, for the month of May. (534)

2. ASSIGNMENT OF CHOSE IN ACTION—*Effect.* What may accrue in the future under an executory contract may lawfully be assigned; but the assignee takes subject to any defense or set-off which the debtor may have against the assignor. (535)

Plaintiff sued as assignee of one Archambault for the use of a horse during the month of May. The contract was dated in February and ran from month to month, defendants agreeing to pay a stipulated monthly rate for the use of the animal. Archambault also refused to surrender plaintiff's wagons which were in his possession. *Held*

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that Archambault's defalcation, and the record of a replevin suit which defendant's had prosecuted to recover their wagons, and the damages awarded them in that action, were all relevant and competent evidence against the claim of the assignor. (534, 535)

Error to Denver County Court.—Hon. H. S. CLASS, Judge.

Mr. DUNCAN MCPHAIL, for plaintiff in error.

No appearance for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

The defendant in error recovered judgment against the plaintiff in error upon an alleged assignment of certain amounts claimed to be due and owing from the plaintiff in error to one George Archambault. The evidence is quite meager. The foundation for the claim is based upon an oral agreement that Archambault should furnish the company a horse during each month, to be used on one of its delivery wagons, and another horse at any time wanted, to be used on another wagon, the company to pay $27.50 per month for the horse to be used continuously, and $1.50 per day for the horse which was to be used when wanted. The contract was entered into about February the 1st, 1912, its terms appear to have been complied with until sometime in May. Upon April 26th, same year, the defendant in error gave notice to the company that the money due and to become due to Archambault thereunder had been assigned to her. Within three or four hours thereafter, and on the same day, a garnishee summons was served upon the plaintiff in error out of a Justice of the Peace court, in a suit against Archambault. The summons called to be held all moneys due or to become due from the company to him. The company appears to have answered this garnishee summons alleging that it owed the defendant nothing, and no issue appears to have been taken to this answer, and nothing

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further appears to have been done in that respect. Archambault continued to furnish the company the regular horse until about the 30th of May following, when he refused to furnish it, and refused to allow the company the possession of its wagons.

Numerous defenses were presented to this action among which was the claim that upon account of Archambault's failure to furnish the horse for the whole of May as agreed upon, it being an entire contract, that neither he nor his assignee could recover thereunder, and that in any event the company had the right to hold any money in its possession belonging to Archambault under the contract, and apply it as a set-off to any damages caused it upon account of the breach of contract. These defenses were rejected by the court.

The evidence is undisputed that the contract was a monthly proposition, to run from month to month, and that at the expiration of the month of April the amount for that month was due and was a subject of assignment by itself. There is evidence to show that it was thus assigned and the company was notified to that effect during the latter part of that month, and prior to any service of garnishee, and also prior to any breach of the contract upon behalf of Archambault for the month of May, and, as the court was of opinion it was sufficient to establish these facts, he was justified in rendering his judgment accordingly. Such was not the case however, when applied to the horse to be furnished during the month of May, when it appears Archambault refused to live up to his contract. This, the company offered to prove, and upon account thereof it was compelled to bring a suit in replevin against Archambault in order to recover its wagons, which were in his possession under the provisions of the former contract. It further offered in evidence the judgment secured by it against him in said action in the County Court of the same county for $106 upon account thereof, and which amount had not been paid; all of which was rejected by the court. In this the

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trial court erred. This controversy, the damages pertaining thereto, as well as the replevin suit, grew out of the same transaction and contract between the parties under which Archambault attempted to assign the amount coming to him from the company for the month of May to Mrs. Richie, and while there was notice of this assignment to the corporation, there was no evidence that it accepted it or agreed to pay the amount coming due to him, to her, and while Archambault had a right to assign anything which he had coming under the provisions of this contract, under such circumstances the assignee took it subject to the rights of the debtor pertaining to damages, set-offs, etc., and its right to have ascertained and satisfied such claims of its own caused by any breach thereof by Archambault before anything would be owing to the assignee.—Sections 4 and 64, Revised Code, 1908; *Michigan Stove Co. v. Pueblo Hardware Co.,* 51 Colo. 160, 116 Pac. 340; *Warren v. Hall,* 20 Colo. 508, 38 Pac. 767; *Smith v. Wall,* 12 Colo. 363, 21 Pac. 42; *Weaver v. Penny,* 17 Ill. App. 628; *Niver v. Nash,* 7 Wash. 558, 35 Pac. 380.

Other errors need not be considered. The judgment is reversed and the cause remanded for a new trial.

Reversed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

[No. 8056.]

FORMAN v. CITY OF CENTRAL.

1. JUDGMENT—*Conclusive Effect.* Plaintiff was arrested, imprisoned and convicted of the violation of an ordinance. He afterwards brought his action against the city for such arrest, detention and imprisonment, alleging that the ordinance under which the proceeding was had, was

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void for want of publication. *Held* that the validity of the ordinance was a question within the jurisdiction of the magistrate, before whom it was arraigned, and no appeal having been taken from the judgment of conviction it was not subject to collateral attack. (538)

2. MUNICIPAL CORPORATIONS—*Liability to One Prosecuted for the Violation of a Void Ordinance.* Plaintiff declared against the city for an unlawful arrest, and his detention in jail over one night, for the alleged violation of an ordinance, void for want of publication, alleging that the jail where he was incarcerated was a cheap wooden affair, liable to catch afire; that during the night of his detention therein, he was compelled to arise and rebuild the fire, that during his imprisonment he was deprived of the exercise necessary to his health and comfort; that while in the jail he was searched for fire-arms; that his trial, against his protests, was conducted in the presence of the police judge, and about 500 citizens. *Held* that the validity of the ordinance not being an open question, upon the record even though the city could be held liable for the misconduct of its officers, which was not determined, nothing in the complaint entitled plaintiff to an award of damages. (540)

Error to Gilpin District Court.—Hon. CHARLES MCCALL, Judge.

Mr. GEORGE W. FORMAN, *pro se.*

Mr. CHASE WITHROW, for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

The plaintiff in error brought this action against the City of Central to recover damages upon account of the alleged acts of certain of its officials. A demurrer was sustained to his complaint; he declined to amend and brings the case here for review. The substance of his complaint necessary to consider is, that in March, 1909, while in the City of Central, he was regularly charged, arrested, tried and convicted for the violation of an alleged ordinance of said city affecting the public peace; that he was fined $15 and costs, which he refused to pay; that thereupon the said Police Judge did unlawfully pretend and profess to sentence and decree that he be con-

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fined in the city jail until the fine and costs were paid, or until he should be discharged as provided by law, whereupon he again refused to pay said fine and costs, and refused to go to jail; that after such sentence, decree and commitment, as aforesaid, and while the plaintiff in error was then being held and detained in the Police Court, the defendant city, by and through its officers, did attempt and endeavor to make him work and labor in and upon the streets of the city during the time which he should have been imprisoned under the sentence and commitment of the Court; that he refused to work upon the streets, and that then and thereupon he was, by the city, through its officers and employes, given his liberty and allowed to go free; that the persons named were the officers of said city and were all acting for and on behalf of said city, and in the performance of their rights, powers and privileges claimed by the city to be, by it then, possessed; that the pretended ordinance under which he was tried was void for the reason that it had never been passed or adopted by the city as provided by law, in this, that it had never been published according to law or otherwise and that said city knew at the time that said ordinance was not in effect.

It is further alleged, that the attempted effort to make him work upon the streets was beyond the powers granted the city by its charter; that while the plaintiff was in jail he was unlawfully searched for firearms; that the jail was a small, cheap, wooden affair; that it was necessary, during the night he was confined therein, to have heat and that the city failed to supply it, but only furnished a stove with fuel for that purpose and that he was compelled to arise from his bunk in the night and put wood on the fire; that there was danger of the jail catching afire; that while he was retained therein, which from the complaint appears to have been during the night preceding his trial, he was deprived of all exercise necessary and requisite to his good health and comfort. It is further alleged that the said pretended trial of the plaintiff

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in error in said Police Court, which was conducted over his objections and protests, took place in the presence of about five hundred citizens and residents of said city.

Assuming for the purposes of the case, but without deciding, that the city would be liable for the actions of its officers while acting under a void ordinance pertaining to peace matters, the demurrer was properly sustained. The complaint discloses the regularity of the proceedings in a matter wherein the city had the right to enact and enforce its ordinances pertaining thereto. Whether the ordinance under which the defendant was being tried was void for lack of publication was a question to be raised and determined at the trial of the defendant when charged with its violation; that was a question within the jurisdiction of the magistrate to determine. Not having raised the question, or if he did, the court evidently having decided against him, and no appeal having been taken therefrom, the judgment became final, and, the court having jurisdiction in the premises, it must be respected until reversed, set aside or annulled, as provided by law.

In *Taggart v. Fugel,* 46 Colo. at page 402, 105 Pac. 1091 this court said:

"A judgment by a court having jurisdiction, however erroneous, not appealed from, or questioned in the manner and time as provided by law, is nevertheless conclusive upon all parties affected thereby, and cannot be attacked collaterally."

From the foregoing and other cases cited therein, it follows that this action in this respect is clearly a collateral attack upon the former judgment, which cannot be reached in this manner. We are not impressed with counsel's contention that because the city gave him his freedom and did not attempt to enforce the commitment, for that reason it was not incumbent upon him to appeal from the judgment, if he desired at any time thereafter to attack its regularity. The judgment was for $15 and costs; according to his complaint it still thus stands against him. The commitment appears to have been

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authorized by ordinance for the enforcement of the payments of such judgments. Whether the city was authorized to provide such a system is unnecessary to determine, for the reason the complaint discloses that it was not thus enforced.

Plaintiff has alleged the existence of another ordinance of the city pertaining to the collection of fines by compelling work upon its streets, which it is alleged the city was without authority to enact. Authorities are cited to sustain this position. We deem it unnecessary to pass upon the validity of this ordinance for the reason the complaint discloses that the city did nothing other than make its demands upon the plaintiff that he work out the amount of his fine, which he refused to do, and thereupon he was given his liberty.

The search of the plaintiff for firearms while in the custody of the Marshal in the exercise of a sound discretion was within that officer's right, when conducted in a reasonable manner. The fact that the jail was a small, cheap, wooden affair does not call for damages against the city. Also, the fact that it was simply supplied with a stove and fuel for the comfort of its inhabitants over night, to be kept up by them, should they desire further heat after retiring, it is not sufficient to call for an award of damages. That there might be danger of its catching afire is probably true, as likewise there might be danger of other frame buildings or even those constructed of more substantial material; being subject to such danger is readily apparent, but the allegations in this respect are not sufficient to justify a claim for damages upon account thereof. No detailed allegations are alleged to show that it was any more subject to such danger than any other portion of the city.

The allegation that while he was therein, which, as stated, appears to have been during one night, he was deprived of all exercise necessary and requisite to his good health and comfort, is inconsistent with that to the effect that he declined to work upon the streets the next day, and is not followed with any statement that his

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health was affected upon account of the want of exercise during that period. The bare allegation that a large number of citizens attended the trial states no part of a cause of action against the city.

The fact that the plaintiff was arrested one day for violating the ordinance, detained over night and tried during the next day, is not sufficient of itself to show that he was either unlawfully or unreasonably restrained of his liberty. There is no allegation that he was denied, or that he even requested bail; there is no allegation in this respect to show that he was retained any unreasonable length of time. The gist of his action is based upon the theory that as the ordinance was void the court was without jurisdiction, and hence his detention for any length of time was unlawful, for which he was entitled to damages. For the reasons above stated, he is not entitled to have this question determined in a collateral attack upon that judgment as here attempted.

Perceiving no prejudicial error, the judgment is affirmed.

Affirmed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

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[No. 8066.]

SCAVARDA v. THE PEOPLE.

1. CRIMINAL LAW—*Second Offense.* The phrase "subsequent violation of the act" in Rev. Stat. § 4108 means "second conviction". There is no impropriety in proceeding against the offender by an information in two or more counts for different violations of the statute. (543)

2. CONVICTION—*Construed.* Separate counts, conviction under each and judgment imposing a fine and imprisonment for fifteen days under the first count, and imprisonment only, for the same period, under the second count, "concurrently" with that imposed under the first. *Held* that the judgment under the second count added nothing to the punishment under the first, save in name. (542)

3. EVIDENCE—*Competency.* Information for the sale of liquors in anti-saloon territory. Defendant offered the lease under which he occupied the premises. It contained a clause to the effect that defendant should not sell intoxicating liquors without the written permission of the landlord, and defendant offered to prove that no such permission had been requested or granted. *Held* properly excluded. (543, 544)

Error to Fremont County Court.—Hon. JAMES L. COOPER, Judge.

Mr. JOSEPH H. MAUPIN, for plaintiff in error.

Hon. FRED FARRAR, Attorney General, and Mr. FRANK C. WEST, Assistant Attorney General, for the people.

Mr. JUSTICE HILL delivered the opinion of the court:

The plaintiff in error was convicted on two counts of an information; the first charged him with the sale of beer, etc., in antisaloon territory; the second, with the sale of whisky, etc., within the same territory. Both offenses were charged to have been committed on the same date. Separate verdicts were returned. On the first, a sentence of fifteen days imprisonment and a fine of $100 was imposed. On the second, fifteen days imprisonment

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was fixed as the penalty to run concurrent with that imposed under the first count.

Several errors are assigned. The first group, in substance, is, that the court was without authority to instruct, and the jury was without authority in law to return a verdict on both counts; that the court was without jurisdiction to receive such verdicts and enter judgments thereon. It is claimed that if the sales charged constitute two separate offenses, as it is alleged the court instructed, that the defendant could not be tried therefor in one action, for the reason that the penalty provided for a second violation is different from that for a first, and in such case it would be necessary that the information charging a second offense contain appropriate allegations to be supported by evidence that the accused had been previously convicted of a first offense, etc., for which reason in this respect there was a misjoinder of offenses in the information. It is also claimed, if the two counts constitute but one offense that the jury had no right to return a separate verdict of conviction for each count and that the court was without authority to render two judgments against the defendant. Numerous authorities are cited which it is claimed sustain the contention that the judgment should be reversed, regardless of which position is assumed.

There was no attempt to impose a penalty upon the plaintiff in error as provided for a second conviction, and it is questionable if he has any right to complain concerning the punishment at all, for the reason that the one imposed under the second count was fifteen days imprisonment, to run concurrent with that under the first count, and hence added nothing to his punishment except in name. The act under consideration, section 4108, Revised Statutes 1908, provides that any person convicted of a second or any subsequent violation of the provisions of the act, shall, upon conviction thereof, be fined not less than $200 nor more than $500, and be imprisoned in the county jail for not less than thirty nor more than ninety days. This count does not appear to have had oc-

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casion to pass upon this question heretofore, though some other states, where somewhat similar language is contained in their statutes, have given it consideration.

In *Carey v. State*, 70 Ohio St. 121, 70 N. E. 955, the information contained three counts of the sale of intoxicating liquor to different persons on the same day, but it did not allege previous convictions; held, in legal effect a charge of a first offense only. In commenting upon the subject, at page 124, the court says:

"'The term 'offense' in the statute embraces the entire charge though there may be a number of counts. The provision as to punishment is that the convicted party shall 'be fined not more than two hundred dollars nor less than fifty dollars for the first offense, and shall for a second offense be fined not more than five hundred dollars nor less than one hundred dollars, and for any subsequent offense be fined not less than two hundred dollars and be imprisoned not more than sixty days and not less than ten days.' The manifest purpose is to increase the penalty for offenses after the first because the party has persisted in violating the law. With this purpose in mind it seems clear that the term 'second offense' means second conviction. Hence, as this was the first trial for the violation of the law there could be no imprisonment as part of the sentence.''

To the same effect is *Tuttle v. Commonwealth,* 2 Gray. 68 Mass. 505, where the question was gone into fully and the same result reached, as is also the ruling in *Matter of Buddington,* 29 Mich. 472; from the reasoning of all of which it follows that for the purposes of the penalty to be imposed the defendant was being tried for his first offense under the local option statute, for which reason there was no misjoinder in the causes of action or the instructions pertaining thereto, or verdicts rendered thereon.

Over the people's objection the plaintiff in error was permitted to introduce in evidence the lease under which he held the premises in which the alleged sales were made. It contained a clause to the effect that he was not authorized to sell, or allow to be sold, on the prem-

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ises any intoxicating liquors without permission in writing from the lessor. He next sought to show by the lessor that no such permission had been asked or granted, to which objections were sustained. We find no error in this respect. Eliminating the question of its being self-serving, it was immaterial to the issue being tried, as was the lease itself. The same may be said of rejected testimony offered to show that the plaintiff in error, who was a postmaster, had invited inspection of his premises by a post office inspector.

Perceiving no prejudicial error, the judgment is affirmed.

Affirmed.

CHIEF JUSTICE MUSSER and MR. JUSTICE GABBERT concur.

[No. 8162.]

HENWOOD v. THE PEOPLE.

1. CRIMINAL LAW—*Plea of Autrefois Acquit—Former Jeopardy.* Defendant was accused, in separate informations, of the murder of one Copeland and one Von Phul, different individuals, and was confined without bail under each of the informations. A trial for the murder of Copeland resulted in a conviction, which, on error brought was reversed. Defendant upon his own motion, under Rev. Stat. § 2926 was discharged of the imprisonment under the information for the murder of Von Phul, and thereupon pleaded this discharge to the other information, alleging that all the shots fired by him were directed against Von Phul alone, and constituted one transaction. *Held* that even if the killing of both Von Phul and Copeland were to be regarded as a single transaction the effect of the discharge of the defendant from the former information was in no sense a trial upon the merits; that as to that information it did not appear that the accused was ever in jeopardy; that it was not the purpose of the statute to enable the guilty to escape, but to give effect to the provision of the Bill of Rights which guarantees to every accused person a speedy trial; that the statute is to be construed and applied in the light of the particular

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facts presented; that upon defendant's own theory that the killing of Von Phul and the killing of Copeland were one act, the prosecution for the murder of Copeland was in strict conformity with the statute, therefore his discharge of the accusation in respect of Von Phul has not the effect to bar the prosecution for the other homicide. (551, 552)

2. ——*Continuance—Diligence.* The prisoner on May 8th was allowed a continuance to May 26th, in order to afford time to take the gree, it is the exclusive province of the jury to determine the question deposition of a witness named residing without the state, or ascertain the whereabouts of others named, and secure their presence at the trial. The cause being set or called for trial, the defendant applied for a commission for the examination of one of the witnesses named in the former application. *Held* properly denied as not made in apt time (552)

Whether the deposition of a non-resident witness may be taken in a criminal cause, *Quaere.* (552)

3. ——*Examination of Juror on Voir Dire.* Defendant's counsel had been permitted to examine a member of the jury by hypothetical questions, involving the defense of the accused. *Held* that the prisoner could not complain of questions afterwards propounded by the district attorney, in line with those of his own counsel. (553)

4. ——*Homicide—Self Defense.* It may be said in a general way that one is entitled to act on appearances, in using a deadly weapon to defend himself; but the appearances must be such as, taking into consideration the circumstances, at the particular instant, would have caused a reasonable and prudent man to use such weapon for his protection. (572)

5. ——*Office of Jury.* Where there is in the record sufficient evidence of all the facts necessary to constitute murder in the first de- of guilt or innocence, the degree of the crime, and the manner of punishment, and it is not within the authority of the court to say that the verdict should have been other or different. (573)

6. ——*District Attorney—His Duty,* defined and enlarged upon, and particularly his duty to repudiate everything that savors of chicanery, and all appeals to unworthy prejudice, and see that no conviction shall take place except in strict conformity with the law. (559)

There was testimony tending to establish improper relations between the prisoner and the woman in the case; also testimony tending to show that Von Phul was infatuated with the woman. The husband of the woman was a witness for the prisoner, and upon the conclusion of his testimony, in quitting the witness stand, stopped and shook hands with the prisoner. *Held* a proper matter of comment to the jury; but the District Attorney having referred to another case in which

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as he said the counsel for the prisoner had pursued the same tactics, and, as he claimed with success, the latter statement was held improper. (563, 564)

Argument to the jury that when the prisoner shot Von Phul, without justification and with deliberation and malice, and one of the bullets struck and caused the death of an innocent by-stander he was guilty of murder *held* proper, there being evidence to establish the matters of fact relied upon in the argument. (567, 568)

Defendant pleading self-defense the District Attorney commenting upon the instructions of the court that "great bodily harm", meant "a serious and severe injury", argued that the danger to be apprehended from Von Phul was not so imminent as to require the taking of his life, so that the accused was not entitled to plead self-defense. *Held* legitimate. (568, 569)

The District Attorney urged the jury to find the accused guilty of murder in the first degree and prescribe in their verdict the penalty of death, arguing that if men like the accused could go out and wreck homes, and thereafter shoot in the back men of whom they were jealous, and shoot indiscriminately into a crowd, and then be turned loose, there would be no safety for law-abiding citizens; and that there would be no necessity for courts or juries unless in such case, an example was set. *Held* there being testimony to support all the matters of fact so urged upon the jury, the argument was no more than an appeal to them to discharge their duty. (569)

The coat worn by Von Phul at the time of the shooting was in evidence and it was claimed by the prisoner that a hole in it corroborated the testimony of the prisoner that he shot in self-defense. One of the attorneys for the prisoner had had the coat in his possession,—always in the presence of others. The District Attorney argued that what was claimed to be a bullet-hole was in fact a knife-cut, and insinuated that defendant's counsel could have made it. This being assigned for error *held* it was for the jury to determine how the hole was made, its appearance was a proper matter of combat, and it was not improper to call the attention of the jury to the question. (570)

In view of the fact that counsel for the prisoner were, throughout the trial, vigilant to protect his rights, and that the court repeatedly admonished the jury not to accept as evidence the opening statement or the arguments of counsel it was concluded that in determining the guilt or innocence of the prisoner the testimony alone was considered. (571)

7. ——*Evidence—Examination of Witness*, as to his occupation and antecedents is proper, as bearing upon the credit to be accorded to his testimony. (561)

8. ——*Former Testimony of Witness Beyond the Jurisdiction of the Court.*—To receive in behalf of this state, at the second trial the recorded testimony of a witness at the first, who has gone and remains

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beyond the jurisdiction of the court, is not a violation of the constitutional provision entitling the accused to meet the witnesses against him face to face. (554, 557)

The evidence of the absence of the witness held sufficient. (558)

9. ——*Opening Statement of Prosecutor.*—The purpose thereof is to give to the jury an understanding of the case from the viewpoint of counsel. The statement should not be in the nature of an argument, and the District Attorney should be careful not to include statements relative to testimony not competent to *prove* any issue in the case. (553)

10. WRIT OF ERROR—*Harmless Error.* It seems that error to the prejudice of the accused in the examination of a juror on the *voir dire* is harmless when the juror is not finally accepted upon the panel. (553)

Improper statements of the prosecuting officer in his opening statement to which objection is promptly sustained by the trial court cannot be assigned as error. (553)

An assertion by the District Attorney that the report of the testimony of a witness at a former trial had been falsified having been fully explained, and the District Attorney shown to be in error, could not have influenced the jury and is not assignable as error. (561)

At the conclusion of the examination of one Garver for the defense, the District Attorney, speaking in a low tone asked leave of the court to file an information for prejury against this witness. None of the jury heard this application, though the fact was published in the newspapers of the city. About the same time the District Attorney, in a published interview, stated, in effect, that he understood women of the under-world would be called to bolster up the defense. That he would not stand for the repetition of what had occurred in a former case which he mentioned. No claim was made that by reason of either of these publications any witness who the prisoner desired to call had refused to testify, or left the jurisdiction. Conceding that the District Attorney acted improperly in making the statement attributed to him, and that the filing of the information against Garver should not have been published, *held* that in the absence of any showing that the accused had been prejudiced the matter could not be assigned for error. (561, 562)

Held further that the statement of the District Attorney, manifestly referring only to witnesses who should testify falsely could not have had the effect to terrify an honest witness. But the court add that the place to try any action is the forum which the law has provided, and not in the public press. Remarks made by the District Attorney to the jury, objection to which is promptly sustained are not prejudicial. (562)

An angry wrangle by counsel touching a mere question of law, is not prejudicial to the accused. (560)

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11. VERDICT—*Comments of the Trial Judge*—That the accused "ought not to suffer the penalty of death" *held* not a disapproval of the finding of guilty of murder in the first degree. (574)

12. CONSTITUTIONAL LAW—*Summoning Jury.—Chapter 159 of the Acts of 1911*, providing for appointment of a jury commission in every county having a population exceeding one hundred thousand, according to the last census, state or federal, is not local or special and in no manner contravenes the constitutional provision against special laws. (552)

Error to Denver District Court.—Hon. CHAS. C. BUTLER, Judge.

Mr. JOHN T. BOTTOM and Mr. HARRY L. LUBERS, for plaintiff in error.

Hon. FRED FARRAR, Attorney General, Mr. FRANK C. WEST, Assistant Attorney General, Mr. JOHN A. RUSH, District Attorney, Mr. CHARLES T. MALONEY, Deputy District Attorney, for the people.

Mr. JUSTICE GABBERT delivered the opinion of the court:

May 24th, 1911, plaintiff in error, whom we shall hereafter designate as defendant, shot and killed Sylvester L. Von Phul. For this homicide an information was filed May 31, 1911, charging him with murder. George E. Copeland, a bystander, taking no part whatever in the difficulty between the defendant and Von Phul, was struck and killed by some of the shots fired by defendant at Von Phul, and June 1, 1911, an information was filed charging defendant with the murder of Copeland. Defendant was arrested, committed without bail, and arraigned under both of these informations, and pleaded not guilty. For the killing of Copeland he was tried and found guilty of murder in the second degree, and sentenced to the penitentiary for life. He brought that case here for review and the judgment was re-

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versed, and the cause remanded for new trial. *Henwood v. People,* 54 Colorado 188.

A second trial of the case resulted in a conviction of murder in the first degree and sentence of death, and it is this judgment which is before us for review. The defendant was not brought to trial under the information charging him with the murder of Von Phul, and in February, 1913, and prior to the date the case charging him with the murder of Copeland was tried the second time, he filed a motion to be discharged in the Von Phul case, based upon the provisions of section 2926, Revised Statutes 1908, which are as follows:

"If any person shall be committed for any criminal or supposed criminal matter, and not admitted to bail, and shall not be tried on or before the expiration of the second term of the court having jurisdiction of the offense, the prisoner shall be set at liberty by the court, unless the delay shall have been on the application of the prisoner. * * *"

The motion was granted and the defendant set at liberty in that case. Thereafter defendant filed a plea of *autrefois acquit* in the Copeland case. On motion of the District Attorney certain portions were stricken. The defendant elected to stand on his plea as then presented. The District Attorney then demurred to the plea, upon the ground that it was not sufficient in law to preclude the people from prosecuting; that it did not show that defendant was acquitted of the crime of killing Von Phul, and shows that the killing of Copeland was a separate and distinct offense from the crime charged in the information charging him with the murder of Von Phul. The demurrer was sustained, and this ruling is assigned as error.

The plea was to the effect that the killing of Von Phul and the killing of Copeland constitute one and the same offense, on the theory that all the shots fired by defendant were fired at Von Phul, with the intention that they should strike him and none other, and that setting him at liberty in the Von Phul case was equivalent to an

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acquittal in that case, and hence barred a prosecution of the offense as charged in the Copeland case. Generally speaking, the plea of *autrefois acquit* is a plea by the defendant that he had been formerly tried and acquitted of the same offense charged in the information to which the plea is made. Such a plea when sufficient and established is upheld by virtue of the provisions of our bill of rights, and the principle of the common law to the effect, that a person shall not be twice put in jeopardy for the same offense. Conceding, but not deciding, that the plea alleged facts from which it appears the crimes charged in the two informations constitute one and the same offense, we will consider the contention on behalf of defendant, that setting him at liberty in the Von Phul case was equivalent to an acquittal by a jury, or barred a prosecution for the murder of Von Phul, and was therefore a bar to the prosecution for the murder of Copeland. The proceeding setting the defendant at liberty in the Von Phul case was in no sense a trial on the merits; neither does it appear therefrom, that he has been placed in jeopardy in that case. It was not the purpose of our statute to enable the guilty to escape, but to prevent unnecessary delays on the part of the prosecution, so that the utmost which can be claimed for the statute, generally speaking, is that it was thereby intended to give effect to that provision of our bill of rights which guarantees one accused of a criminal offense a speedy trial, and therefore, when one charged with a crime brings himself within its provisions, he is entitled to be set at liberty, and cannot afterwards be committed or held for the same offense, when charged therewith in a second indictment or information.

The statute however, must be construed and applied in the light of the particular facts presented, when the effect of setting one at liberty under its provisions is involved, so that his rights thereunder will be fully preserved, and not result in the miscarriage of justice. Turning to the plea we find it is there alleged; that on May 31, 1911, an information was filed charging defend-

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ant with the murder of Von Phul; that to this information he pleaded, not guilty, and the case was set for trial June 19, 1911; that June 1, 1911, an information was filed charging him with the murder of Copeland, to which he pleaded, not guilty, and the cause was set for trial June 19, 1911; that this latter cause was tried with the result that defendant was convicted of murder in the second degree; that he sued out a writ of error to the Supreme Court, and in due course the judgment was reversed and the cause remanded for a new trial, and that thereafter the defendant was set at liberty under the information charging him with the murder of Von Phul, by virtue of section 2926, Revised Statutes 1908, as above noted. Facts are then alleged which it is claimed established that the offenses charged in the two informations constitute one and the same crime. It thus appears, adopting the theory of the plea, that thereby it is shown the defendant was charged in the two informations with the same offense, that he was brought to trial and prosecuted therefor in the Copeland case within the time fixed by the statute. In such circumstances he has been prosecuted in strict conformity to the statute, according to his own theory, for the murder of Von Phul, by the prosecution of the Copeland case, and hence, setting him at liberty in the Von Phul case cannot and does not operate to bar the prosecution of the information charging him with the murder of Copeland. In our opinion the ruling of the trial court in sustaining the demurrer to the plea is correct. In passing upon this question it must be borne in mind we have not decided, that from the plea it appears the informations constitute one and the same offense, or that by setting him at liberty in the Von Phul case he could not be prosecuted for the offense charged in that case under a second information for the same offense, but assuming that the contention of his counsel in this respect is correct, and also assuming that they are correct in their claim that by the plea it appears the informations charge the same crime, we base our conclusion that setting him at liberty in the

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Von Phul case did not operate to prevent the prosecution of the case at bar, for the reason, it appears from his plea that he has been diligently prosecuted as the statute requires for the offense with which he was charged, by the information in the Von Phul case, and therefore the statute is not applicable to the facts presented by the plea or the question sought to be raised thereby.

Subsequently to overruling his plea, the defendant applied to the court for a commission to take the deposition of a witness in his behalf, which was denied. This ruling is assigned as error. The witness resided without the state. It appears that on May 8, 1913, the defendant applied for a continuance of the case to May 26, 1913, in order to have time to take the deposition of a witness named, or ascertain the whereabouts of others named in the application, and have them personally present at the trial. The application for continuance was granted. On May 28, the day the cause was set or called for trial, the defendant applied to the court for a commission to take the deposition of one of the witnesses named in the application, and it is the ruling denying this application of which complaint is made. Without expressing any opinion on the right of a defendant in a criminal action to take the deposition of a witness without the state, we think the ruling was right upon the ground that the application was not made in apt time.

The defendant moved to quash the jury panel, because the members were selected and summoned by the jury commissioner under the act of 1911. The motion was denied. It is claimed the act is local and special, and contravenes the constitutional provisions inhibiting special laws. In our opinion neither this objection nor any others urged in support of the motion are tenable.

Error is assigned on questions by the District Attorney in his examination of a juror. The prime purpose of the examination of a juror on his *voir dire* is to ascertain whether if selected he will be fair and impartial and render a verdict according to the evidence and the law, guided by the instructions of the court. For

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this purpose considerable latitude must be allowed counsel, and perhaps to a limited extent hypothetical questions are proper. It is this class of questions propounded by the District Attorney of which counsel for defendant complain. Over the objection of the District Attorney counsel for defendant had been permitted to propound questions to the juror of a similar import, which embraced the theory of the defense, and the questions of the District Attorney complained of were propounded afterward with the object of eliciting more fully the views of the juror as expressed in response to the hypothetical questions of counsel for defendant. In such circumstances the defense cannot successfully complain of questions by the District Attorney which were in line with those propounded by them. We think some of the facts assumed by the District Attorney were not proper, and that testimony to establish them would not be admissible, but it is clear that the court, in ruling upon the hypothetical questions, advised the juror that the hypothetical case could not be considered as evidence, so that embracing incompetent matters in such question could not have prejudiced the defendant. In addition, it appears the juror did not finally sit in the case.

Complaint is next made of the opening statement of the District Attorney to the jury. The purpose of an opening statement is to acquaint the jury with the nature of the case they have been selected to consider, advise them briefly regarding the testimony which it is expected will be introduced to establish the issues involved, and generally give them an understanding of the case from the viewpoint of counsel making the statement, so that they will be better able to comprehend the case as the trial proceeds. Such statement should not be argumentative, and the District Attorney should always be careful not to include statements relative to testimony not competent to prove any issue in the case. The statement under consideration did embrace matters which were not relevant, but it appears that all objections by counsel for defendant as the statement pro-

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gressed were promptly sustained by the court, so that by the vigilance of his counsel and the rulings of the court the defendant was not prejudiced by any remarks of the District Attorney in making the opening statement for the prosecution.

As further protecting the rights of the defendant, we call attention to the fact that the court in instructing the jury said: "These instructions contain the law which will govern you in this case and in determining the facts you are to consider only the evidence given upon the trial. The *opening statements and the arguments of* counsel are not evidence."

On behalf of the prosecution the testimony of two witnesses who appeared and testified at the former trial was read from the stenographic notes. So far as advised from the record it does not appear that any objection was made by the defendant to the introduction of the testimony in this form; but waiving this, we will consider the argument of counsel to the effect that by permitting the testimony to be read the rights of the defendant as guaranteed by section 16 of article 2 of the constitution, that the accused is entitled "to meet the witnesses against him face to face," were violated. As we understand the briefs, the testimony was permitted to be read to the jury for the reason it appeared that the witnesses who gave it at the former trial were absent from the state and beyond the jurisdiction of the court. The decisions of the different states are not in harmony on the question of whether such testimony is admissible against the accused in such circumstances. In this jurisdiction, in the case of *Young v. The People,* 54 Colo. 293, 130 Pac. 1011, that question was under consideration, and it was there determined that when it appears that witnesses who testified at a former trial of the case on the part of the prosecution are beyond the jurisdiction of the court, their testimony so previously given is admissible at a second trial and may be read to the jury.

Greenleaf, in his work on evidence, section 163, states the rule to be that the testimony of a witness be-

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yond the jurisdiction of the court, given in a former action, is competent evidence in a subsequent action between the same parties, involving the same issues. The reason for the rule is that it comes up to one of the demands of the law in such circumstances in that it is the best evidence which can be produced. *United States v. Macomb,* 5 McLean, 286 Fed. Cas. No. 15702. When a defendant in a criminal action has had the opportunity to face a witness testifying on the part of the prosecution in the trial of the case on its merits and cross-examine him, as in the case at bar, the great and ordinary test of the truth of his statements is no longer wanting, and admitting the testimony so given at a retrial of the case does not violate any of the defendants' rights. In *Mattox v. United States,* 178 U. S. 458, 44 L. Ed. 1150, 20 Sup. Ct. 993, cited by counsel for defendant, it was held that the testimony of a witness for the government given at a preliminary trial of the defendants was not admissible. From a perusal of the opinion it appears that the real basis of this conclusion was that the absence of the witness was the fault of the prosecution. Speaking on this subject it was said:

> "It did not appear that Taylor (the witness) was absent from the trial by the suggestion, procurement or action of the accused. On the contrary, his absence was manifestly due to the negligence of the officers of the government. Taylor was a witness for the prosecution. He had been committed to jail without bail. We have seen that the official agent of the United States, in violation of law, took him from jail after the trial of this case commenced and strangely enough placed him in charge, not of an officer, but of another witness for the government, with instructions to the latter to allow him to stay at a hotel at night with his family. And on the very day when Taylor was called as a witness, and within an hour of being called, he was in the corridor of the court house. When called to testify he did not appear. * * * In the present case there was not the slightest ground in the evidence to suppose that Taylor had absented himself from the

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trial at the instance, by the procurement or with the assent of either of the accused. Nor (if that were material) did his disappearance occur so long prior to his being called as a witness as to justify the conclusion that he had gone out of the state and was permanently beyond the jurisdiction of the court. His absence, as already said, was plainly to be attributed to the negligence of the prosecution."

In *Mattox v. United States,* 156 U. S. 237, 39 L. Ed. 409, 15 Sup. Ct. 337, it was held that when a person accused of a crime is tried and convicted and the conviction is set aside and a new trial ordered, a properly verified copy of the reporter's stenographic notes of the testimony of a witness for the government at the former trial, who was then fully examined and cross-examined and who died after the first trial and before the second, is admissible in evidence against the accused at the second trial. In that case it was claimed on behalf of the accused that admitting the testimony referred to infringed his constitutional right to be confronted with the witness against him. The court, after calling attention to the fact that in some states it had been held that such testimony was not admissible over the objection of the accused, said:

"Upon the other hand, the authority in favor of the admissibility of such testimony, where the defendant was present either at the examination of the deceased witness before a committing magistrate or upon former trial of the same case, is overwhelming."

Referring to the case of *United States v. Macomb, supra,* the court said:

"All the cases up to that time were cited in the opinion and the decision put upon the ground that the right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read. * * * The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits such as were sometimes admitted in civil cases being used against the

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prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness, and that if notes of his testimony are permitted to be read he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficial in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused. * * * The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face and of subjecting him to the ordeal of a cross-examination."

If the testimony of a deceased witness given at a former trial of the case against the accused is admissible against him at a second trial of the same case, for the reasons above noticed we can see no reason why the testimony of a witness given at a former trial is not admissible against the accused at a second trial when such witness is beyond the jurisdiction of the court, because in that instance it is impossible for the prosecution to produce such witness in court by process. The trial court did not err in admitting the testimony.—*Vaughan*

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v. State, 58 Ark. 353, 24 S. W. 885; *Lett v. State,* 124 Ala. 64, 27 South. 256; *State v. Nelson,* 68 Kan. 566, 75 Pac. 505, 1 Ann. Cas., 468.

Counsel for defendant call attention to the fact that in several states it has been held that the character of evidence under consideration is admissible because of statutory provisions on the subject. Such provisions could not deprive the accused of a constitutional right, hence can not be regarded as authority for the introduction of testimony which would not be admissible if violative of either federal or state constitutional guaranties.

It is next claimed that there was no positive or affirmative proof that the witnesses whose testimony was read to the jury as given at the former trial were out of the state or beyond the jurisdiction of the court. A witness on behalf of the prosecution was called who testified that each had left the state permanently, one going to Dakota and the other to California. In addition, it is asserted by counsel for the people in their brief, and not denied by defendant, that prior to the trial the people had subpoenas issued for these witnesses directed to the sheriff of each county in the state, and that the returns thereon disclosed that neither of the witnesses could be located within this jurisdiction.

We now come to a consideration of the errors assigned on the alleged misconduct of the District Attorney. It is to be regretted that questions of this character are so frequently called to our attention in criminal cases brought here for review from the District Court of the City and County of Denver, and that complaints on this score have extended over a number of years. In several instances we have had occasion to caution District Attorneys on this subject, and in some have been compelled to reverse convictions and order a new trial solely because of the misconduct of the District Attorney. There is no excuse for a District Attorney indulging in remarks or taking a course verging on misconduct. For as said in *Ritchey v. The People,*

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23 Colo. 314, 41 Pac. 272, 384, by way of quotation from Wharton on Criminal Law, section 3003: "It is scarcely necessary to add that a prosecuting attorney is a sworn officer of the government, required not merely to execute justice but to preserve intact all the great sanctions of public law and liberty. No matter how guilty a defendant may in his opinion be, he is bound to see that no conviction shall take place except in strict conformity to law. It is the duty indeed, of all counsel to repudiate chicanery, and appeal to unworthy prejudice, in the discharge of their high office; but eminently is this the case with public officers elected as representing the people at large, and invested with the power which belongs to official rank, to comparative superiority in experience, and to the very presumption here spoken of, that they are independent officers of state." It is certainly the duty of a District Attorney to try a criminal action in such manner, in accordance with the rules of law as will result in presenting it fully and fairly to a jury, but he has no right, through misguided zeal to trespass on the verge of error, nor pursue a course which may result in a reversal of a judgment of conviction at the expense and detriment of the people. We mention these matters be cause of the frequency with which the alleged misconduct of the District Attorney is raised in criminal actions tried in the second judicial district (and not always without reason), and to urge upon these officials the necessity of refraining from conduct which can be made the basis of a charge of misconduct, and likewise to urge upon the District Court the necessity of putting a stop to such practices by the exercise of the power it possesses.

While not all together in the order in which questions called to our attention by counsel for defendant in error should be considered, we will pass upon the alleged misconduct on the part of the District Attorney in the trial of the cause and arguments to the jury. Many of these are of little moment, and were it not for the gravity of the case would not be mentioned. For in-

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stance counsel for the defendant asserted that by the action of the court he had been acquitted in the Von Phul case. To this the District Attorney replied, he had not. A colloquy then occurred between counsel as to the effect of the order of the court in setting the defendant at liberty in the Von Phul case, during which strong language was used. Clearly nothing that was said by counsel on either side on the subject could have had any effect on the jury as the matter being discussed was one of law purely, and not of fact. In this connection we note the record shows that the District Attorney and leading counsel for defendant were guilty of conduct, at different times, which the court should not have tolerated, although not of a nature which could have had any effect upon the jury, except to cause them to regret that counsel engaged in the trial of a case involving life did not conduct themselves in a more proper and dignified manner.

Again when the defendant was on the stand and being cross-examined, the District Attorney appears to have had some controversy with him, which in a measure at least, was prompted by the answers of the defendant and his characterization of him as a prosecutor, but not of a nature which could have prejudiced the defendant in the eyes of the jury.

In cross-examining the defendant the District Attorney asked several questions, objections to which were sustained. Whether these rulings were right or wrong is not material as they related to trivial matters which could not have had any effect upon the case. The District Attorney however, insisted in repeating some of these questions. This was unbecoming on his part to say the least, and the court would have been justified in taking such steps as would have put a stop to such conduct; but as we have said these questions related to matters of such trivial moment that although the conduct of the District Attorney should have been severely censured it did not prejudice the defendant.

Other witnesses testifying for the defense were

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asked questions on cross-examination, the purpose of which was to show their occupation and antecedents. We think this was proper in order to enable the jury to pass upon their credibility.

The foreman of the jury at the first trial was being questioned on the part of defendant with respect to the testimony of a witness given at that trial as to what he stated regarding the position of Von Phul when he was shot. The District Attorney charged defendant's counsel with falsifying the record of the previous trial as to such testimony. There does not appear to have been any basis for such a charge. In order to better understand the point being considered, we call attention to the fact that the matter being inquired about was whether Von Phul, at the time he was shot, was standing with his right arm or his right hand on his hip pocket. The stenographer at the former trial had written right arm, in taking the testimony of the witness who testified on the subject. Counsel for defendant contended this was a mistake, and in the previous bill of exceptions the extension of the notes of the stenographer had been corrected by counsel for defendant so as to read right hand instead of right arm, without objection on the part of the then District Attorney and was presented to the Supreme Court as thus corrected. The witness on the stand (the former juror), stated that at the former trial the testimony of the witness was right hand. It thus appears that the matter was fully explained to the jury, and that the assertion of the District Attorney, of which complaint was made, was of no moment, and could not have influenced the jury in the slightest degree.

One John T. Garver was called as a witness for the defendant. At the conclusion of his testimony the District Attorney demanded that he return at two o'clock. Later in the presence of the jury, he requested that the witness remain until excused, although counsel for defendant assert that the District Attorney said, "until released." The bill of exceptions signed by the trial judge states that the District Attorney said, "until ex-

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cused," and we must accept that as correct. Counsel for defendant, however, assert, as embodied in the motion for a new trial, that afterwards the District Attorney in the presence of the jury asked leave of court (though in a muffled tone) to file an information charging the witness with perjury. From the record it is clear that this action could not have influenced the jury. In opposition to the motion for a new trial an affidavit of each juror was presented, from which it appears that not a single member was aware that an information had been or was to be filed charging Garver with perjury. That an information had been filed against Garver was published in the Denver papers, and it is claimed that this may have terrorized the witness, as well as any other witness whom the defendant may have desired to call. About the same time the District Attorney in an interview published in a Denver paper stated in effect, that he understood that women of the under world would be put on the stand to bolster up the case of the defendant; that a number of new witnesses would be called; that if they were all right they had the right to testify, but that he would not stand for a repetition of the Gertrude Patterson case; that that case was a disgrace and he was going to see to it that there would be no perjured testimony.

It is claimed that this may also have terrorized or intimidated witnesses for the defendant. When these publications were called to the attention of the court, and before any statement was made respecting their nature, the jury was excused from the court room. No claim is made on the part of the defendant that either of the publications caused any witness whom he desired to call, to refuse to testify or leave the jurisdiction of the court. Conceding then, that the District Attorney should not have made the statement attributed to him in the published interview, and that the filing of an information against Garver should not have been published, we think it must affirmatively appear that defendant was prejudiced thereby, before such matters can be said to con-

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stitute error, and in the absence of such showing that he was thus prejudiced, the claim made that he was, is purely speculative. Moreover, it is apparent from the statement published, that it only referred to witnesses testifying falsely. Such a statement could not have frightened an honest witness, and reduced to its final analysis amounted to nothing more than a statement by the District Attorney that he would perform his duty as a prosecuting official. We call attention however, to the fact that the place to try an action is the forum which the law has provided and not in the public press.

Our attention is also directed to the fact that the District Attorney had criticized two of the peace officers of the City and County of Denver by stating to them he understood they were working for the defense, when as they were in the pay of the people they ought to be assisting the state. When this occurred we are not advised, but it is not claimed that this statement deterred either of these parties from testifying or giving the defendant such information as they might possess material to his defense, and it cannot therefore be said that the action of the District Attorney in criticizing them, prejudiced the defendant.

The theory of the prosecution was, that Von Phul and the defendant were infatuated with the woman in the case, and that the shooting of the former was prompted by the jealousy of the defendant. There was testimony tending to prove that improper relations existed between the woman and the defendant. The husband of the woman was a witness for the defendant, and testified that he had never observed anything verging on the improper between defendant and his wife. At the conclusion of his testimony on leaving the witness stand, he stopped and shook hands with the defendant. The assistant District Attorney in his opening argument to the jury referred to this incident as a trick. Whether it was intended to make an impression on the jury favorable to the defendant by exhibiting in their presence that friendly relations existed between the witness and the

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defendant, was a proper matter for the prosecution to comment upon. Continuing his comment the assistant District Attorney referred to a case where counsel (neither of those appearing here), who had examined the witness had pursued the same tactics in another case which he claimed were successful. We think this was improper, but this statement was not objected to. Aside from this the leading counsel for defendant, without objections, made a statement to the jury to the effect, that he had talked with the attorney who had examined the witness and was authorized by him to say that the statement of the assistant District Attorney respecting the outside incident was false and without foundation, that he had not requested the witness to shake hands with the defendant, and that this act, so far as he knew, was voluntary on the part of the witness.

Much space in the brief for defendant is devoted to excerpts from the closing argument of the District Attorney, which it is claimed were unwarranted and prejudicial to the defendant, that can be considered without stating them in full, after first giving a synopsis of the salient testimony in the case, and the theory of the respective parties upon which the case was tried.

Von Phul was shot by defendant in the barroom of the Brown Palace hotel. It was shots intended for Von Phul that struck and killed Copeland, and the case was tried by the prosecution upon the theory that defendant was guilty of murder in taking the life of Von Phul, and therefore, guilty of murder in killing Copeland. The defense was self-defense, while on the part of the prosecution it was claimed the defendant purposely provoked a difficulty with Von Phul in order to have a pretext to take his life, actuated by jealousy of Von Phul. The prosecution claimed, and introduced testimony to establish that defendant and Von Phul were rivals for the favors of the woman in the case; that the relations of defendant with this woman were improper, and that similar relations had previously existed between Von Phul and the woman; that Von Phul had recently ar-

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rived from St. Louis and had been paying the woman attention. There was also testimony on the part of the people to the effect that the alleged improper relations of the woman and defendant commenced while defendant was a guest at the home of the husband of the woman, and that defendant was endeavoring to interest the husband in an enterprise which he was promoting, for which he required capital. The defendant and Von Phul had a quarrel in the room of the latter the day preceding the homicides. Regarding this quarrel the defendant testified that he had been commissioned by the woman to secure letters she had written Von Phul; that he went to his room for that purpose; that Von Phul struck him on the head with a shoe tree, and drew a revolver saying he would kill him if he were armed, and that after this quarrel and on the day preceding the homicides, he purchased the revolver with which the homicides were committed to defend himself, as he had been informed subsequent to the quarrel that Von Phul had threatened to kill him. Further evidence on the part of the people was to the effect that after the first difficulty with Von Phul the defendant went to the chief of police and tried to induce him to have Von Phul driven out of the city, at the same time stating that if Von Phul sent the letters mentioned, to the husband of the woman, he, the defendant would kill him; that on the evening of the homicides he went into the dining room of the Brown Palace at the dinner hour, but refused to take a seat at the table indicated by the waiter. Later when Von Phul and a party of friends were seated at a table, defendant took the seat he had refused which was next to the table occupied by Von Phul and his friends, and during dinner made offensive and sneering remarks, apparently directed at Von Phul, and of a character calculated to bring about a quarrel. One of the parties at the table with Von Phul testified that the conduct of defendant was so offensive that the witness volunteered to assault him, but was restrained by Von Phul, who told him to pay no attention to the matter.

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The testimony on the part of the prosecution bearing on the shooting is substantially as follows: Several persons, including Von Phul, Copeland, and the defendant, were in the barroom of the Brown Palace hotel several hours after what occurred in the dining room. Some twenty or thirty persons were present. The defendant and others with him, at his invitation, were about to take a drink at the bar, while Von Phul and another party were standing at the bar for the same purpose. After ordering the drinks the defendant left his place at the bar and went over to Von Phul and touched him on the shoulder. Von Phul turned around, and after the exchange of a few words struck the defendant with his fist, and knocked him down with considerable force, and immediately turned to the bar, standing with his back to the defendant with his right arm resting on the bar; that he did not attempt to pursue the defendant or draw a revolver, or make any demonstration towards him; that defendant raised from the floor and attempted to draw his revolver; that two men seized and tried to prevent him from shooting; that he pushed them aside, and commenced shooting at Von Phul; that during this time the latter did not advance on defendant or make any hostile demonstration whatever, and that as soon as the first shot was fired Von Phul started to walk out of the barroom, but that defendant followed him up and kept on shooting and pulling the trigger after the shots had all been fired. Two of the shots struck Von Phul in the back, and one his right wrist. The testimony discloses that at the time of the shooting Von Phul was unarmed. A number of witnesses testified that after knocking the defendant down Von Phul paid no further attention to him, but turned away and resumed conversation with his friends. There was also testimony introduced on the part of the people to the effect, that shortly before the shooting the defendant advised a friend of his to "stick around" the barroom as there was likely to be "something doing."

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The defendants' version of the affray as disclosed by his testimony was substantially as follows: That he entered the barroom and invited parties who had attended the Broadway Theatre with him to have a drink; that Von Phul was standing at the bar; that Von Phul changed his place and took a position nearer him; that Von Phul was making remarks which he could not hear, but were apparently directed at him; that the expression on Von Phul's face was one of hatred; that his actions led him to believe trouble was coming; that he thought it best to say something to Von Phul; that he went over to him and asked him if he would not reconsider what had been said and the threats he said he was going to carry out the day before; that Von Phul replied, "He was going up and grab the old gray headed (using an epithet) and pull him out of the room and tell him he was master there. I am going to get all three of them, I am going to get you first"; that these remarks were followed by a blow, which felled him to the floor with such force as to daze him; that he arose quickly and drew his revolver and commenced shooting at Von Phul, who stood facing him with his right hand on his hip pocket.

It appears from the testimony that after these occurrences the husband of the woman brought a suit against her for divorce. It also appears that previous to the affray Von Phul had torn the picture of the defendant, which the woman had in her possession.

Whatever is fairly deducible from the testimony comes within the legitimate sphere of argument to the jury. The argument of the District Attorney to the effect that defendant shot Von Phul in the back is of this nature. According to the testimony two of the shots struck him in that part of his body. The District Attorney said this coward, (the defendant) sneaked up behind Von Phul and shot him in the back. The testimony for the people was to the effect that Von Phul was standing at the bar with his back to the defendant, and paying no attention to him whatever when he commenced shoot-

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ing. Of course it must be understood that in commenting on the testimony, we are not stating what is true or untrue, but merely referring to such portions thereof as would justify assertions of the District Attorney in his argument, it being the province of the jury to pass upon the credibility of such testimony, so that over assertions, if any, as to what it might establish, would certainly not influence the jury in determining what facts it did establish.

The District Attorney also said in substance that when the defendant shot Von Phul in the back, without justification, and with premeditation, deliberation, and malice aforethought, and one of the bullets struck an innocent bystander and caused his death, he was guilty of murder of the first degree. This line of argument was not unwarranted. The contention on the part of the people was, that defendant was guilty of murder in taking the life of Von Phul, and therefore, unintentionally killing Copeland, by bullets intended for Von Phul, was also murder. There was testimony to establish this contention. All through the case the people insisted that one of the motives which actuated the defendant to shoot Von Phul was jealousy, and it was in no sense improper to argue to the jury any and all matters which tended to establish that improper relations existed between the woman and the defendant, and the fear Von Phul would supplant him, and what would be the result upon him if that occurred, which bore upon the question of motive.

The picture incident was also referred to, but only by way of an assertion that it would not be a justification for shooting Von Phul.

Referring to the plea of self-defense the District Attorney in effect said, that if the danger to be apprehended from Von Phul was not so urgent as to require the defendant to shoot, there was no self-defense in the case; and referring to the court's instructions stated, that the words "great bodily harm" meant something more than a slight injury, and that it meant a serious and severe injury. Commenting further, it was stated

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that the court had said that assault and battery from which only slight injury was liable to come was not great bodily harm, and therefore, there was nothing upon which to base the plea of self-defense. The purpose of this argument was to show that the shooting, as disclosed by the evidence and under the instructions of the court, was not justified. This was legitimate, and while the statement of the District Attorney may not have been strictly accurate, it was in no sense misleading.

The District Attorney also made a strong appeal to the jury to return a verdict of murder in the first degree and fix the penalty at death, and urged that if men like the defendant could go out and wreck homes and shoot men in the back, and shoot into a crowd, and then be turned loose, there would be no safety in the community for law abiding citizens, and that there would be no necessity for courts or juries, unless examples were made of cold blooded murder. It must be conceded that the appeal was strong, but there was testimony to establish that defendant was guilty of murder, and appealing to the jury to do their duty as the law provides, and why they should discharge their duty, was a proper matter for the District Attorney to urge upon their attention.

Other remarks were made by the District Attorney, to which objections were interposed and promptly sustained, and the jury advised by the court to disregard them. Clearly such remarks did not prejudice the defendant. Some were made to which objections were not interposed at the time in the way of reference to the defendant that were uncalled for. Trial courts should promptly stop remarks which are simply abusive of a defendant. However, counsel for defendant were vigilant at every stage of the case in protecting his rights. The trial court at their request had several times admonished the District Attorney, and advised the jury to disregard statements to which objections had been made, so that it is evident the jury understood that statements which had no bearing on the case as made by the testi-

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mony were not to be regarded by them, and for these reasons we are satisfied the defendant was not prejudiced by the remarks under consideration.

During his argument the District Attorney referred to the change in the testimony of a witness for the defendant, to which we have referred, so that it read "right hand" instead of "right arm." The circumstances under which the change was made have already been noted. The District Attorney characterized the change as a forgery. This statement was not justified, and counsel for defendant objected to it. The court very properly said that alteration would be better than forgery, and advised the jury to disregard the charge of forgery against counsel. The only question was whether right arm or right hand was correct. From all the circumstances the jury understood that was the issue, and unwarranted assertions by the District Attorney could not cause them to overlook the real question involved. As was aptly said in *The State v. Gulliver*, 142 N. W. 947, decided by the Supreme Court of Iowa: "Jurors must be supposed to have some capacity to distinguish between the fury and fustian of partisan oratory and the rational analysis of testimony."

The coat worn by Von Phul when shot was in evidence. It was claimed that a bullet hole in the coat corroborated the testimony tending to establish that defendant shot in self-defense. It appears that one of the attorneys for the defendant had had the coat in his possession, but always in the presence of others. The District Attorney in his argument exhibited the coat to the jury, and claimed that the hole was not made by a bullet, but was a knife cut, and also intimated that counsel for defendant might or could have made the cut. The coat was before the jury, and they could determine from the appearance of the hole how it was made. Its appearance was proper to comment upon, and it was not outside of the record to call attention to how it might have been made. The District Attorney also referred to the incident of a witness shaking hands with the de-

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fendant. We have already considered that matter. In referring to counsel who examined that witness, the District Attorney said, "I wonder if he thinks that this is another Gertrude Patterson jury?" Counsel for defendant objected to this statement. The court promptly sustained this objection, and the District Attorney said, "I withdraw it."

This concludes a review of the questions based on the alleged misconduct of the District Attorney, and we are satisfied from the record that defendant was not prejudiced by the action of counsel representing the people. He was represented by able and vigilant counsel, who never overlooked an opportunity to protect his rights. The court admonished the jury several times not to consider matters to which objections were made and sustained. The court instructed them, as we have above noted, that in determining the facts they were to consider only the evidence given at the trial, and that the opening statements and arguments of counsel were not evidence. From these authoritative sources the jury understood that in determining the guilt or innocence of defendant the testimony alone was to be considered.

Errors are assigned upon instructions given which relate to the plea of self-defense. The objection urged is that thereby the burden of proof was cast upon the defendant to prove his innocence. They are not susceptible of this construction. They stated the circumstances under which self-defense was available, and when a defendant under the law would be justified in taking the life of a human being, in accordance with the law as oft times declared by this court. But it is urged that the instructions embody the common law doctrine "of retreat to the wall," which has been modified in this jurisdiction. We do not so read them. The cases to which counsel refer on the subject considered instructions which stated in substance that to justify homicide under the plea of self-defense, it must appear there was no other way for the defendant to save his life, or save himself from great bodily harm, except to take the life of

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his assailant. The instructions in the case at bar do not so declare the law, but do announce in accordance with the previous decisions of this court, in what circumstances, as applicable to the testimony in this case, a defendant may lawfully take a human life in order to save his own, or prevent great bodily injury to himself, and do not intimate that he must retreat, if by that course he could save his life, or save himself from great bodily harm without shooting his assailant. It is also claimed the instructions are erroneous because they say in effect that it must have appeared to the defendant, and the circumstances must have been such that it would have appeared to a reasonable person similarly situated that the danger was so urgent, imminent, and impending, and not prospective, not even present in the near future, that it was absolutely necessary for him to kill Von Phul in order to save his own life, or prevent his receiving great bodily harm, (1) because by the use of the word "absolutely" it meant the danger must have been actual; (2) that thereby the jury were advised that a weapon must have been actually drawn and directed against the defendant before he would be justified in shooting; (3) because defendant was justified in acting upon the circumstances as they appeared to him. The use of the word absolutely is the language of the statute, section 1634, Revised Statutes 1908. The instructions do not in any manner convey the idea that the defendant was not justified in shooting unless Von Phul had actually drawn a weapon, but submit to the jury to determine whether from all the circumstances, in accordance with the law, the defendant was justified in shooting Von Phul. It is true in a general way that a defendant, in using a weapon to defend himself is entitled to act on appearances, but they must be such, taking into consideration the circumstances and his surrounding at the particular instant of time, as would lead a reasonable and prudent man to use a weapon under like circumstances for protection.

It is also contended that by an instruction the court

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invaded the province of the jury by practically directing a verdict of murder in the first degree. There is no foundation for this contention.

Error is also assigned on instructions requested and refused. The first of these requests was fully covered by the instructions given. With respect to the others we think it is sufficient to say that counsel do not cite any authorities to support them, neither do they cite any cases holding that the instruction of the court on the same subject is not correct.

It is next urged that the testimony is insufficient to sustain a verdict of murder in the first degree, and not sufficient to support any verdict of guilty higher than voluntary manslaughter. There was testimony to establish all the facts and elements necessary to constitute murder in the first degree, and while there was testimony from which the jury might have found a different verdict, it was their exclusive province to determine from the testimony his guilt or innocence and the degree of the offense for which the defendant was on trial, if guilty, and hence it is beyond the authority of this court, from a review of the record, to say the verdict should have been different when there is sufficient testimony to sustain the one returned.

The final question urged is that the verdict is excessive. It is true, when the case was here before the judgment was reversed because the court instructed the jury "That there is no manslaughter in this case." We held this prejudical error for the reason there was testimony tending to establish manslaughter, and that its credibility and force were for the jury to consider in determining the facts, and not a matter of law for the decision of the court, and therefore, by the instruction given, they were deprived of their exclusive province to determine the grade of the offense. We said however, that, "We did not mean to intimate what the verdict should have been, but as there was not an entire absence of evidence tending to establish the crime of manslaughter it was error for the court to take that question from

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the jury by instructing them, 'That there is no manslaughter in this case.'" Of course a verdict should not be approved by the trial court or this court on review, if the evidence is insufficient to establish it, but when, as we have said, the evidence is sufficient to establish the facts and elements of the crime of which a defendant is found guilty, it cannot be disturbed merely because a verdict for a less degree of the offense might have been returned.

It is claimed the trial court did not approve the verdict because after denying the motion in arrest of judgment he said, "The court has no discretion in fixing the penalty for murder in the first degree; that is a matter solely for the jury. My mind assents to the justness and righteousness of the verdict of murder in the first degree in this case, and I believe that the defendant should suffer the highest penalty known to the law, except the penalty of death. I believe that the death penalty should be inflicted only in the most extreme cases, as where a person commits murder while committing, or attempting to commit rape, robbery, burglary, arson, and the like, or where poison is administered, or where a person lies in wait and shoots down his enemy, and in other cases of a similar character. The facts here, in my opinion, take this case out of that class, and I therefore recommend that the governor commute this sentence to imprisonment at hard labor for life." It thus appears that the trial judge did fully approve of the verdict in finding defendant guilty of murder in the first degree. What he said regarding the penalty fixed by the verdict was merely an expression of his personal views as to the character of cases in which the death penalty should be imposed, and in no sense indicated or intimated that the evidence was insufficient to support the verdict. The law provides, section 1624, Revised Statutes 1908, after defining what shall constitute murder in the first degree, that, "The jury before which any person indicted for murder shall be tried, shall, if it finds such person guilty thereof, designate by its verdict

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whether it be murder of the first or second degree, and if murder of the first degree, the jury shall in its verdict fix the penalty to be suffered by the person so convicted, either at imprisonment for life at hard labor in the penitentiary, or at death; and the court shall thereupon give sentence accordingly." From these provisions it appears that the particular manner in which a murder is committed does not govern the penalty when a verdict in the first degree is returned, but the penalty to be imposed is a matter solely for the jury to fix, either at imprisonment at hard labor for life, or death.

The evidence on behalf of the prosecution was to the effect that defendant had had a serious quarrel with Von Phul the day preceding the homicides; that subsequently he purchased a revolver; that he attempted to have the police drive Von Phul out of the city; that a few hours previous to the shooting he had endeavored to provoke a quarrel with Von Phul; that he approached the latter in the barroom; that when he was knocked down, he arose and attempted to draw his pistol; that he was seized by two men who endeavored to prevent him shooting; that he threw them aside; that Von Phul after knocking him down did not attempt to pursue him, draw a weapon, or make any hostile demonstration whatever; that when defendant commenced to shoot, Von Phul was standing with his back towards him; that Von Phul was shot in the back; that when defendant commenced to shoot, Von Phul retreated; that the defendant followed him up, and continued shooting until all the shots were fired, and still continued to snap his revolver; that the shooting occurred in a room where many bystanders were present, and that Copeland was struck by bullets intended to strike Von Phul. There was also testimony from which it could be inferred that the defendant was jealous of Von Phul. We think this testimony is sufficient to establish all the facts and elements necessary to constitute murder in the first degree.

The judgment of the District Court is affirmed.

It is further ordered that the judgment of the Dis-

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trict Court be executed during the week commencing October 25, 1914.

Judgment affirmed.

Decision *en banc.*

CHIEF JUSTICE MUSSER, Mr. JUSTICE GARRIGUES, Mr. JUSTICE SCOTT, and Mr. JUSTICE BAILEY concurring.

Mr. JUSTICE HILL not participating.

Mr. JUSTICE WHITE dissents.

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INDEX.

APPEALS AND ERROR.

Where an Appeal Lies—Final Judgment—Action by sub-contractors to enforce a mechanic's lien. An irrigation district, and the Empire Construction Company, as owners, and one Crawford, as original contractor, and sundry other sub-contractors and material men, were named as defendants. Crawford by cross-complaint prayed judgment against the Empire Company, and demanded a lien. The Empire Company by a cross-complaint to that of Crawford, prayed judgment against Crawford. A decree was entered denying any lien against the works of the Irrigation District, but declaring that Crawford was liable to the Empire Construction Company in a sum mentioned, that these moneys were subject to a lien in favor of the sub-contractors, the claims of certain sub-contractors were established, the construction company was directed to pay into court the moneys found to be due and owing by it to Crawford, and directions were given for the division of a portion thereof, after payment of the costs, among certain of the lien claimants. As to other lien claimants the cause was continued. Judgment was entered in favor of the construction company and against Crawford, and appeal allowed therefrom. More than a year after the entry of this decree, and more than six months after the adjournment of the term, Crawford filed a motion to vacate the judgment against him, upon the ground, among others, that no final judgment was given from which an appeal could have been taken. *Held* that under § 241 of the code made applicable to proceedings for the enforcement of a mechanic's lien, by Rev. Stat. § 4044, the separate controversy between the construction company and Crawford, all the parties to which were then before the court, was a proper subject of adjudication, that the judgment recovered by the construction company was a final judgment, notwithstanding the continuance of the cause as to the other parties, and that an appeal lay therefrom.—*Empire Company v. Crawford*, 281.

Appellant Must Show Injury—A decree will not be disturbed upon the complaint of a party who shows no specific injury.—*Louden Co. v. Berthoud*, 374.

What May be Assigned for Error—A party will not be heard to complain of a decree to which he expressly consented. Even allegations of a departure from the statute, in a statutory proceeding, will not be considered.—*Loudon Co. v. Berthoud*, 374.

Errors not Assigned—Findings not assigned for error will not be disturbed.—*Louden Co. v. Berthoud*, 374.

Questions not Determined by the Trial Court, will not be considered.—*Kindel v. Colorado & Southern Railway Co.*, 1; *Oles v. Wilson*, 246.

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APPEALS AND ERRORS—Cont.

Where in condemnation proceedings no objection is made below to the damages awarded in respect of land taken, this court will not, on appeal, review such award.—*Phipps v. Denver*, 205.

Appellant will not be heard to contend in the court of review that his consent to a decree, in the District Court, was obtained by fraud, where no such contention was made below.—*Louden Co. v. Berthoud*, 374.

Finding on Sufficient Evidence, will not be disturbed.—*Salisbury v. LaFitte*, 358.

Substantial Justice Accomplished—Where it appears that further litigation will not produce a result more favorable to the complaining party, immaterial errors will be disregarded.—*Stratton's Estate v. Fonnerty*, 413.

Harmless Error—The striking from a pleading of matter which may be proven under other allegations is harmless—*Martinez v. Martinez*, 292.

Action for injuries to a child by the negligent operation of a street railway car. Evidence was received that children had been seen playing on the street, in that vicinity, at other times. *Held* that the jury could not thereby have been misled into any improper inference. —*Denver Tramway Co. v. Brown*, 485.

Verdict Upon Conflicting Evidence—Where a case has been properly submitted, the weight and sufficiency of the evidence is wholly for the jury, and their verdict will not be set aside except in case of palpable wrong. Any other rule would invade the constitutional right of trial by jury.—*Denver Tramway Co. v. Brown*, 485.

Cross Errors—Errors to the prejudice of defendant in error will not be considered when no cross errors are signed.—*Kindel v. Colorado & Southern Co.*, 1.

Partial Error—The award of execution upon the allowance of a claim against a decedent's estate will not suffice to reverse the judgment of allowance. The award of execution stricken out.—*Stratton's Estate v. Finnerty*, 413.

Adjustment by Parties—Effect—Where the parties to a judgment have adjusted their controversy a writ of error to review the judgment will be dismissed, even though there is depending the claim of the attorneys of the successful plaintiff below, to a lien upon the judgment, and a dispute as to the amount to be awarded to the attorneys. This controversy, must, in the first instance be adjusted in the lower court.—*Nichols v. Katres*, 471.

Bond—Appeal Dismissed—Liability of Surety—The power of the supreme court to suspend execution of a judgment by awarding a supersedeas is not limited by the provisions of the code, § 432.—*National Co. v. Schafer*, 56.

An appeal from a judgment of the district court had been dismissed. More than thirty days thereafter, on error brought to the

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APPEALS AND ERRORS—Cont.
same judgment, this court awarded a supersedeas, and the bond required by the statute was given. Later, on application of the creditor, the district court, acting under § 432 of the code, entered judgment on the appeal bond, against the surety therein, for the full amount of the judgment and interest. Considering the absurdity and injustice of a construction of the code provision which would impose absolute liability upon the surety, when this court might, in the exercise of its unquestioned jurisdiction, vacate the judgment which was the sole ground of the creditor's right, and the surety's liability, *held*, that the judgment of the district court upon the appeal bond was error.—*Id.*

ASSIGNMENTS.

Of Chose in Action—Effect—What may accrue in the future under an executory contract may lawfully be assigned; but the assignee takes subject to any defense or set-off which the debtor may have against the assignor.

Plaintiff sued as assignee of one Archambault for the use of a horse during the month of May. The contract was dated in February and ran from month to month, defendants agreeing to pay a stipulated monthly rate for the use of the animal. Archambault also refused to surrender plaintiff's wagons which were in his possession. *Held* that Archambault's defalcation, and the record of a replevin suit which defendants had prosecuted to recover their wagons, and the damages awarded them in that action, were all relevant and competent evidence against the claim of the assignor.—*Inland Co. v. Richie*, 532.

Reassignment, to the original party, of a contract previously assigned by him, restores his right of action for a fraud inducing to enter into such contract.—*James v. Aspelin*, 381.

ATTORNEYS.

Contracts with the Client are construed most favorably to the interest of the client, and the attorney is held to strict compliance with his undertaking.—*Keeler v. Hoyt*, 120.

Contract Construed—The contract between client and attorney provided that the attorney should be entitled to a certain fee if the supreme court should "uphold the validity of" a certain issue of county bonds. In a cause conducted by the attorney, the same for which he was employed, the validity of the bonds was affirmed by the supreme court, against all objections thereto made in that litigation. The fact that other objections were afterwards raised by the client, constitutes no defense to an action for the attorney's fee; nor does the raising of objections by others, no attempt being made to show the facts upon which these objections were founded.—*Id.*, 120.

Undue Influence upon the Court—In vacating a decree of the county court it was noticed that the presiding judge of that court was not a person learned in the law; that the plaintiff's attorney was act-

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ATTORNEYS—Cont.
ing as clerk of the court at the time of the preparation of the voluntary deed which was in question, took the plaintiff's acknowledgment thereof, and probably framed it; and that he did not resign his position, until six days before the trial. The court expressed the fear that the attorney may have exercised an undue influence upon the judge.—*Martinez v. Martinez*, 292.

AUDITOR AND TREASURER.

Powers—Shortly before the end of the biennial period in each of the years 1906 and 1908 the Medical Board had drawn large sums from the custody of the Treasurer, leaving, at least in one of those years, no money at all to the credit of the fund. December 31, A. D. 1910, the auditor, by an entry in his books, assumed to transfer from the fund, of the Medical Board, a sum, the exact amount of the money so withdrawn in 1906, 1908; this upon the belief or suspicion that the withdrawal and subsequent deposit of those sums was a mere subterfuge, to enable the Medical Board to retain these moneys within their own control, and thus defeat the statute; and upon the opinion that it was within both his power and duty to make such withdrawal and transfer, in order to defeat the supposed unlawful conduct of the Medical Board.

Held that while the facts set forth in the agreed case upon which the cause was submitted were sufficient to justify the suspicion of the auditor, the matter was not for his arbitrary determination; that the civil and criminal conduct of the members of the Medical Board are for judicial determination, after full hearing.

The duty of the State Treasurer in this respect is purely ministerial. The transfer to the General Fund directed by the statute must be made at the date prescribed and only to the amount in the custody of the Treasurer, at that date. The Treasurer has no power to make the transfer as of any other date, nor to review any of the official acts of the Medical Board.—*State Medical Board v. Kenehan*, 504.

BILL OF EXCEPTIONS.

When Necessary—Where the evidence is not presented the refusal of an instruction will not be considered.—*Rogers v. Rogers*, 132.

CASES OVERRULED, EXPLAINED OR DISTINGUISHED.

The rule announced in *Charlton v. Toomey*, 7 Col. Ap. 304, that the recitals of a treasurer's deed of land sold for taxes must affirmatively show that every preliminary step required to divest the title was regularly taken as prescribed by law, must be read in connection with the statute declaring the effect of the deed. The statute is not to be ignored.—*Imperial Co. v. Morris*, 194.

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CASES OVERRULED, EXPLAINED OR DISTINGUISHED—Cont.

The opinion in *Bryant v. Miller*, 48 Colo. 192, so far as it assumes that, where at a tax sale land was stricken off to the county on the second day of the sale, the deed must recite that the lands were offered on the first day, and again offered on the second day; so far as it assumes that in such case, a deed in the statutory form discloses that the lands were not offered upon the first day; and so far as it assumes that the deed must set forth the different dates upon which the lands were offered, and when the county is the purchaser must disclose when the lands were first offered, and the day of each subsequent offer, is overruled.—*Imperial Co. v. Morris*, 194.

What is said in *Atchison Co. v. Farrow*, 6 Colo. 498, as to the effect or application of Rev. Stat. § 2056 is *dicta.—Denver, etc. Co. v. Frederic*, 90.

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The Inquiry, is limited to whether the court below exceeded its jurisdiction or greatly abused its discretion—*Chenoweth v. State Medical Examiners*, 74.

COMMON CARRIERS.

Transporting Explosives—A common carrier may lawfully carry dynamite and like explosives, but may not expose persons to danger from an explosion, where this is not necessary for the proper performance of his duty as a carrier. A car containing dynamite, and loaded with other merchandise in such manner that the dynamite could not be removed without unloading the car, was unnecessarily left standing upon the tracks of a railway in the vicinity of occupied by dwellings. It was not placarded with notice of its dangerous contents. A fire breaking out in the vicinity, those engaged in attempting to extinguish it were not warned of the presence of the explosives, nor was any attempt made to remove the car, though a half hour intervened before any explosion occurred. *Held* the receiver in charge of the railway might by the jury be declared negligent.—*Wilson v. Colorado & Southern Co.*, 303.

CONSTITUTIONAL LAW.

Amendment of the Constitution—Evidence of—The facts upon which depend the question whether an amendment proposed to the constitution has received the approval of the people will be judicially noticed.—*Harrison v. The People*, 137.

The published volumes of the general statutes of 1883, and Mills Statutes, accepted as prima facie evidence of the constitution, as therein appearing, notwithstanding the manifest defects in the certificate

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of the secretary of state, prefixed to the first, and in spite of the note to § 29 of art. VI found in the second.—*Id.*, 137.

The court having received information from the county clerks of many of the counties, that, as shown by the records and memorials contained in their respective offices, the amendment proposed by c. XVII of Gen. Laws 1877, to § 29 of art. VI, was in fact submitted to the people at the succeeding general election, and being convinced beyond doubt from these sources of information, and the recognition of the amendment in the early decisions of this court, when the matter must have been of common knowledge (5 Colo. 455, 457; id. 487, 490; 6 Colo. 92, 93; 11 Colo. 373, 376) that in fact the amendment so proposed received the popular sanction, declared it to be part of the fundamental law, though no evidence whatever of its submission or adoption was found in the office of the secretary of state.—*Id.*, 137.

Police Power—Extent of the Power—The legislature may enact regulations for the examination and registration of those who would practice medicine. The only limit to the power is that the regulations prescribed shall be reasonable, and of this the courts must judge.

The legislature has no power, under the guise of a police regulation to arbitrarily invade the personal rights and liberties of the individual citizen.

Nor to confer upon a board of medical examiners authority to deny to a physician the right to advertise his business.—*Chenoweth v. State Medical Examiners*, 74.

Taking Private Property—The improvement of the street by the city, rendered necessary by a change in the pipes of a water company located therein by authority of a municipal franchise is not the taking of private property.—*Moffat v. Denver*, 473.

That an easement granted by the owner of the abutting land to lay and maintain in a county road, pipes for conducting water, is, like a similar easement in the streets of a city subordinate to the paramount right of the public to subject it to the public use, when necessary, without compensation.

The rule is the same when the easement is obtained in a county road which afterwards becomes part of the public street of a city. When the lands are brought within the limits of the city, the road becomes at once subject to the control of the municipal authorities. Changing the grade, or constructing a subway therein is not an additional servitude.—*Id.*, 473.

The provision of § 6592 of the Revised Statutes that in the opening of an alley the benefits shall be paid by the owners of property in the block abutting on the alley, is not in violation of § 15, art. II of the constitution.—*Phipps v. Denver*, 205.

Private Property Damaged by Public Improvement—Municipal Corporation Liable—A city is liable for injuries occasioned to private

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CONSTITUTIONAL LAW—Cont.
property by the construction of a subway, in a public street, which allows passage by the public under the tracks of a railway company.

The fact that the railway company constructs the improvement under license of the city does not change the result. *Denver v. Bayer*, 7 Colo. 113; *Idaho Springs v. Woodward*, 10 Colo. 104; *Sorenson v. Greeley*, 10 Colo. 369; *Denver Co. v. Bourne*, 11 Colo. 59 distinguished, as announcing the just and salutary rule that where an improvement is made for the benefit of private individuals, these must bear the burden of making compensation for any injury occasioned thereby.—*Colorado Springs v. Stark*, 384.

Local or Special Laws—Summoning Jury—Chapter 159 of the Acts of 1911, providing for appointment of a jury commission in every county having a population exceeding one hundred thousand, according to the last census, state or federal, is not local or special and in no manner contravenes the constitutional provision against special laws.—*Henwood v. People*, 544.

CONTINUANCE.

Surprise—Surprise is the testimony produced for defendant, alleged during the trial, as ground of a continuance, presents a question which is for the discretion of the trial court.—*Dussart v. Abdo Co.*, 423.

Diligence Required—The action of the trial court in denying an application for a continuance will not be reviewed unless an abuse of discretion is shown.

The application, grounded upon the absence of a witness, was filed upon the day appointed for trial. The cause had then been at issue for more than four months. The affidavit in support of the motion stated that defendant had for two weeks been endeavoring to ascertain the whereabouts of the witness, but failed to state what he had done in or towards this inquiry; and gave no excuse for the failure to institute the search at an earlier date. It averred that plaintiff had received a letter, stating that the witness was at one of three places named, but defendant failed to produce the letter, excuse its non-production, or give the name of the writer. *Held* that there was no abuse of discretion in denying the application—*Rogers v. Rogers*, 132.

The prisoner on May 8th was allowed a continuance to May 26th, in order to afford time to take the deposition of a witness named residing without the state, or ascertain the whereabouts of others named, and secure their presence at the trial. The cause being set or called for trial, the defendant applied for a commission for the examination of one of the witnesses named in the former application. *Held* properly denied as not made in apt time.

Whether the deposition of a non-resident witness may be taken in a criminal cause, *Quaere.*—*Henwood v. People*, 544.

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CONTRACT.

Assent—Evidence—Plaintiff had negotiated the purchase, by a third party, of lands of defendant. By the terms of his agreement with the defendant he was to receive $20,000 from the purchase money. The purchaser having defaulted in sundry payments, plaintiff, at his instance, solicited from defendant an extension of time to the purchaser. Defendant advised plaintiff that if he should grant the extension he would allow him but $10,000 out of the proceeds. Plaintiff strenuously objected, but declared that he was powerless and would be compelled to submit. Defendant finally granted the extension, the purchase was completed, and the purchase money paid in installments, upon each of which plaintiff receipted for a sum equal to his share of the payment, on the basis that his total interest was $10,000. *Held* to fully establish plaintiff's assent to the abatement of his interest in the purchase money; that the transaction was in effect a substitution by all parties of a new agreement for the old one. The new contract was a sufficient consideration for the abrogation of the old one. *Held* further that the original agreement by which plaintiff was to receive $20,000 from the purchase money did not create any fiduciary relation between plaintiff and defendant; that in the new contract each was dealing for himself, and defendant was under no disability arising from the previous agreement.—*Leonard v. Hallett*, 274.

A protest against a proposed arrangement, followed by a full assent thereto, is without effect.—*Id.*, 274.

Validity—One who, upon a consideration promised, agrees by word of mouth to purchase land for another, advancing the purchase money as a loan to his principal, is bound by the engagement.

If he take title in his own name, or in the name of a third person for his own use, equity will compel a conveyance to the principal.

That at the time of entering into the engagement he is negotiating for the land upon his own account and behalf, is immaterial.—*McPherrin v. Fair*, 333.

Implied Promise—Where the owner of lands upon which is an abandoned mine places the mine and its machinery in possession of another, under express contract that the latter shall unwater it, at his own expense, and the person so placed in possession assumes charge and direction of the work, the land owner is not responsible to those employed therein, even though he occasionally visits the mine, and makes suggestions as to the work.

Otherwise, if, during the progress of the work, he knows, or has reason to believe, that those performing the labor or furnishing the material are relying upon him for their recompense, and makes no effort to undeceive them.—*Reynolds v. Norman*, 339.

Effect of Statutory Provision—The provision of Rev. Stat. § 7026 that in the sale of water "every inch shall be considered equal to an inch square under a five inch pressure," etc., is not controlling, in the

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construction of a contract for the enlargement of a ditch, and prescribing a volume of water to which the owners, and those bearing the expense of the enlargement, shall respectively be entitled, unless this was the intention of the parties.—*New Brantner Co. v. Kramer*, 218.

Consideration—A promise without consideration to release one from a fixed liability is *nudum pactum.—Leonard v. Hallett*, 274.

A promise by a parent to commit an infant child to the custody of another is a sufficient consideration for the engagement of the one receiving the child to make a particular provision for the child by will. —*Oles v. Wilson*, 246.

Ratification—The alteration of a contract previously put in writing may be ratified, either by express words or by implication from facts which exclude any other conclusion. By a contract between plaintiff and the Divide Ditch Company, predecessor of defendant, as originally framed, plaintiff conveyed to said company "all rights * * * secured by the appropriation of water from Columbine creek," and said company agreed "to measure the water which may be secured * * * by the Columbine ditch," and pay plaintiff annually, at a certain rate, for one-third of said water, in excess of what, under another provision, it might deliver to him; but the president of the corporation, having before that obtained from plaintiff a conveyance of all his interest in the Columbine ditch, and the appropriation of water thereby made, before delivery of the contract, struck out all words relating to the Columbine ditch and the appropriation thereby, and in a letter transmitting the contract so amended, to plaintiff, expressly called attention to this erasure, declaring that this was never in the agreement. Plaintiff made no objection to this erasure until nearly four years later. Meantime the Divide company and its successors, had, at large expense, completed the Columbine ditch, plaintiff being at the time aware of the work so carried on. *Held*, that by his acquiescence plaintiff had ratified the erasure.—*Divide Co. v. Tenney*, 14.

Construction—The entire instrument is to be considered, and effect given to every word thereof, if possible.

If conflict in its provisions appears the circumstances surrounding the parties and attending the execution of the instrument, and the construction placed upon it by the parties, in the performance of it, before controversy arose, may be inquired into.—*New Brantner Co. v. Kramer*, 218.

Construed—By an agreement between plaintiff and the Divide company, predecessor of the defendant, plaintiff assigned to that company "all rights * * * secured by the appropriation of water by said company from Sand creek and Dead Man's creek," and the company agreed to measure the water secured by the Divide ditch, and pay plaintiff, annually, at a certain rate, for a certain part of these waters. *Held*, that plaintiff was not entitled to an allowance for any

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CONTRACT—Cont.
share of any water except the appropriations which he transferred.—*Divide Co. v. Tenney*, 14.

A contract providing for the sale by one party to the other, of a patent right upon the payment of certain specified sums, at specified dates in the future, subscribed by the seller only, and containing no promise of payment by the purchaser, is a mere option, and imposes no liability upon the latter. Even though he has accepted and acted upon it, and paid a portion of the stipulated purchase money no action lies for the residue.—*Strauss v. Brier*, 63.

Plaintiff's assignor, in February, entered into a contract to furnish defendant a horse to be used in a delivery wagon, the use of the horse to be paid for monthly at a specified rate. In May of the same year the assignor refused to furnish the horse. *Held* that the contract was to run from month to month, and the violation thereof defeated the plaintiff's action on a prior assignment of whatever might be or become due thereunder, for the month of May.—*Inland Co. v. Richie*, 532.

Non-Performance—Effect—Support—Deed Upon Consideration of—Failure to perform the stipulation for support is sufficient ground to vacate the deed, without any showing of fraud or undue influence in procuring it.—*Martinez v. Martinez*, 292.

CONVEYANCES.

Description—Where there are in a conveyance of lands repugnant descriptions, that which in the light of the attendant circumstances most accords with the intention of the parties must be accepted.

When a particular description is plainly false it should be rejected, and if enough remains to locate the land intended to be conveyed, the deed is effective.—*Derham v. Hill*, 345.

Area—Metes and Bounds—Lots 21 and 28, in a subdivision were separated by a road forty feet wide. The proprietor of lot 28 executed a deed containing the following description: "the north nine acres, more or less of lot 28, etc., more particularly described as follows: Beginning at the southwest corner of Lot 21" and running east 640 feet, south 605 feet, west 640 feet, and north to the place of beginning. *Held* apparent that the point of beginning at the southwest corner of Lot 21 was false, and must be rejected; that the north line of Lot 28 must be accepted as the north boundary of the lands intended to be conveyed, that with this line in view as controlling the initial point of the survey, the description by metes and bounds being found to include 8.88 acres, this corresponded sufficiently with the area declared to be conveyed, and fixed its locality; that subsequent purchasers from the grantee in this deed were chargeable with notice of the intention of the grantor so ascertained.—*Id.*, 345.

What Must be Recorded—A contract for the future conveyance of lands is within § 694 Rev. Stat. An assignment by the purchaser of his

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CONVEYANCES—Cont.
right under such contract, not recorded, is without effect as to creditor of such purchaser who, without notice of the assignment levies an execution upon the land.—*Salesbury v. LaFitte*, 358.

COUNTERCLAIM. See PLEADING.

COUNTIES.

Not Liable for Office Expenses of Assistant District Attorney—The act of 1907 (Laws 1907, c. 172) contemplates the maintenance of but one office of the district attorney, in each county of his district, and the district attorney himself, is authorized to contract, and recover from the county, the attendant necessary expenses.

No statute imposes upon the assistant district attorney the duty to maintain an office, or makes the county liable for the expenses thereof.—*Trowbridge v. El Paso County*, 106.

COUNTY COURT.

Jurisdiction—Application by plaintiff in the local land office of the United States to enter land as desert lands. Application denied, and defendant permitted to enter the lands as a homestead. On appeal to the general land office this decision was vacated, and a hearing as to the right of the applicant directed. Pending this appeal the local land office permitted the defendant to make final proof, and delivered to him a patent. *Held*, that the county court had jurisdiction of a bill to cancel the patent.—*Anderson v. Woodward*, 53.

COUNTY SEATS.

Location or Removal—Election—The Act of February 11, A. D. 1881 (Laws 1881, 103, Rev. Stat. §§ 1171-1176) was intended to establish a uniform procedure regulating all elections concerning county seats. It applies to the conduct of an election for the permanent location of a county seat.

All former legislation upon the subject, inconsistent with its provisions is impliedly repealed.—*Sugar City v. Crowley County*, 432.

Qualifications of Voters—In view of § 2, art. XIV, and § 1 of art. VII of the constitution, whether the same rule as to residence should be adopted in elections for the location of a county seat, as in one for the removal of a county seat is a question for the legislature. The provisions of the act of 1881, as to this matter are within the legislative power.—*Id.*, 432.

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CRIMINAL LAW.

Homicide—Self Defense—It may be said in a general way that one is entitled to act on appearances, in using a deadly weapon to defend himself; but the appearances must be such as, taking into consideration the circumstances, at the particular instant, would have caused a reasonable and prudent man to use such weapon for his protection.—*Henwood v. People*, 544.

Office of Jury—Where there is in the record sufficient evidence of all the facts necessary to constitute murder in the first degree, it is the exclusive province of the jury to determine the question of guilt or innocence, the degree of the crime, and the manner of punishment, and it is not within the authority of the court to say that the verdict should have been other or different—*Id.*, 544.

Second Offense—The phrase "subsequent violation of the act" in Rev. Stat. § 4108 means "second conviction." There is no impropriety in proceeding against the offender by an information in two or more counts for different violations of the statute.—*Scavarda v. People*, 541.

Information—An information under Chapter 164 of the Laws of 1909, for maintaining a private employment agency without a license, must show affirmatively that the unlawful agency was maintained in some city or town. Only within cities and towns is the license required. *Langan v. The People*, 32 Colo. 414, distinguished.—*Koike v. People*, 414.

Plea of Autrefois Acquit—Former Jeopardy—Defendant was accused, in separate informations, of the murder of one Copeland and one Von Phul, different individuals, and was confined without bail under each of the informations. A trial for the murder of Copeland resulted in a conviction. Which, on error brought was reversed. Defendant upon his own motion, under Rev. Stat. § 2926 was discharged of the imprisonment under the information for the murder of Von Phul, and thereupon pleaded this discharge to the other information, alleging that all the shots fired by him were directed against Von Phul alone, and constituted one transaction. *Held* that even if the killing of both Von Phul and Copeland were to be regarded as a single transaction the effect of the discharge of the defendant from the former information was in no sense a trial upon the merits; that as to that information it did not appear that the accused was ever in jeopardy; that it was not the purpose of the statute to enable the guilty to escape, but to give effect to the provision of the Bill of Rights which guarantees to every accused person a speedy trial; that the statute is to be construed and applied in the light of the particular facts presented; that upon defendant's own theory that the killing of Von Phul and the killing of Copeland were one act, the prosecution for the murder of Copeland was in strict conformity with the statute, therefore his discharge of the accusation in respect of Von Phul has not the effect to bar the prosecution for the other homicide.—*Henwood v. People*, 544.

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CRIMINAL LAW—Cont.

Summoning Jury—Chapter 159 of the Acts of 1911, providing for appointment of a jury commission in every county having a population exceeding one hundred thousand, according to the last census, state or federal, is not local or special and in no manner contravenes the constitutional provision against special laws—*Henwood v. People*, 544.

Opening Statement of Prosecutor—The purpose thereof is to give to the jury an understanding of the case from the viewpoint of counsel. The statement should not be in the nature of an argument, and the District Attorney should be careful not to include statements relative to testimony not competent to *prove* any issue in the case.—*Henwood v. People*, 544.

Evidence—Competency—Information for the sale of liquors in anti-saloon territory. Defendant offered the lease under which he occupied the premises. It contained a clause to the effect that defendant should not sell intoxicating liquors without the written permission of the landlord, and defendant offered to prove that no such permission had been requested or granted. *Held* properly excluded.—*Scavarda v. People*, 541.

Circumstantial Evidence—The evidence examined and held sufficient, though circumstantial, to sustain a conviction of murder in the first degree.—*Forte v. The People*, 450.

Insufficient Evidence—Defendant convicted of grand larceny upon evidence not sufficient to raise a respectable suspicion. Judgment reversed.—*Riggio v. The People*, 418.

Former Testimony of Witness Beyond the Jurisdiction of the Court—To receive in behalf of the state, at the second trial, the recorded testimony of a witness at the first, who has gone and remains beyond the jurisdiction of the court, is not a violation of the constitutional provision entitling the accused to meet the witnesses against him face to face.—*Henwood v. People*, 544.

The evidence of the absence of the witness held sufficient.—*Id.*

Petition for Change of Venue—Prejudice of the People—Discretion—Prejudice of the inhabitants of the county alleged as the ground of an application to change the venue (Rev. Stat. § 6965), presents a question of fact triable by the court, the result resting in discretion. The decision will not be disturbed unless an abuse of discretion appears.—*Erbaugh v. The People*, 48.

Prejudice of the Judge—Where, in a criminal prosecution, application is made to change the venue on the ground of prejudice in the mind of the presiding judge (Rev. Stat., § 6963), such judge may hear and determine all questions as to the sufficiency of the petition, and the affidavits in support of it; but the question whether in fact such prejudice exists is never tried. If a sufficient showing is made the accused is entitled to the change, as of right, and the court has no further jurisdiction, save to allow the change.

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To deny prejudice and overrule the application upon this ground is error.—*Id.*, 48.

Time of Application—Notice—Waiver—The petition for a change of venue was not filed until the morning of the day appointed for the trial, several months after the information was filed, and the district attorney was not served with any prior notice thereof. Nevertheless he appeared and contested the application, raising no question as to its sufficiency. The record showing nothing to the contrary it was presumed that all objections as to those matters were waived.—*Erbaugh v. People*, 48.

Conviction—Construed—Separate counts, conviction under each and judgment imposing a fine and imprisonment for fifteen days under the first count, and imprisonment only, for the same period, under the second count, "concurrently" with that imposed under the first. *Held* that the judgment under the second count added nothing to the punishment under the first, save in name.—*Scavarda v. People*, 541.

Verdict—Comments of the Trial Judge—That the accused "ought not to suffer the penalty of death" *held* not a disapproval of the finding of guilty of murder in the first degree.—*Henwood v. People*, 544.

Writ of Error—Harmless Error—It seems that error to the prejudice of the accused in the examination of a juror on the *voir dire* is harmless when the juror is not finally accepted upon the panel.—*Id.*, 544.

Improper statements of the prosecuting officer in his opening statement to which objection is promptly sustained by the trial court cannot be assigned as error.—*Id.*, 544.

An assertion by the District Attorney that the report of the testimony of a witness at a former trial had been falsified having been fully explained, and the District Attorney shown to be in error, could not have influenced the jury and is not assignable as error.

At the conclsion of the examination of one Garver for the defense, the District Attorney, speaking in a low tone asked leave of the court to file an information for perjury against this witness. None of the jury heard this application, though the fact was published in the newspapers of the city. About the same time the District Attorney, in a published interview, stated, in effect, that he understood women of the under-world would be called to bolster up the defense. That he would not stand for the repetition of what had occurred in a former case which he mentioned. No claim was made that by reason of either of these publications any witness who the prisoner desired to call had refused to testify, or left the jurisdiction. Conceding that the District Attorney acted improperly in making the statement attributed to him, and that the filing of the information against Garver should not have been published, *held* that in the absence of any showing that the accused had been prejudiced the matter could not be assigned for error.—*Id.*, 544.

Held further that the statement of the District Attorney, mani-

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CRIMINAL LAW—Cont.
festly referring only to witnesses who should testify falsely could not have had the effect to terrify an honest witness. But the court add that the place to try an action is the forum, which the law has provided, and not in the public press. Remarks made by the District Attorney to the jury, objection to which is promptly sustained are not prejudicial.—*Id.*, 544.

An angry wrangle by counsel touching a mere question of law, is not prejudicial to the accused.—*Id.*, 544.

DAMAGES.

Evidence as to—Vendee of lands sues for fraudulent misrepresentations inducing his purchase. The price agreed upon is competent evidence, though not conclusive, of the value of the property if it had been as represented; and is sufficient to carry the case to the jury.—*Mitchell v. Crowl*, 405.

DEATH.

Action for—Statute Construed—The purpose of section 2056 of the Revised Stautes is to protect human life against the fatal consequences of negligence, unskillfulness, or criminal intent, on the part of any officer, agent or servant of any corporation or natural person, in operating any locomotive, car, or train of cars.

The statute is purely penal. The amount of the recovery thereunder depends solely upon the degree of culpability of the defendant. The age or youth, strength or infirmity, capacity or incapacity of the deceased are without effect upon this question.—*Denver & Rio Grande Co. v. Frederic*, 90.

And the right of recovery does not depend, in the least, upon whether, if death had not ensued the injured person could have maintained an action for the injury.—*Id.*, 90.

Under Rev. Stat. §§ 2057, 2058, the amount of the recovery for a wrong resulting in the death of a human being is to be determined by the prospective accumulations of the deceased, having reference to his age, occupation, habits, health, and earning capacity.—*Id.*, 90.

Defenses to the Action—Free Pass—In an action under Rev. Stat. § 2056 that the deceased was riding upon a free pass, stipulating that the passenger "assumes all risks of accident and * * * the company shall not be liable, under any circumstances, whether of negligence by its agents or others" is no defense to the action.—*Denver & Rio Grande Co. v. Frederic*, 90.

Evidence—In an action under Rev. Stat., § 2056, evidence as to the habits, character, age, health and earning capacity of the deceased, or his contribution to his parents is inadmissible. Its admission is fatal error because it is impossible to say how far it may have affected the award of the jury.—*Denver & Rio Grande Co. v. Frederic*, 90.

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DEMAND.

When Necessary—The account of a depositor in an insolvent bank is due without demand.—*First National Bank v. Lewis*, 124.

DISTRICT ATTORNEY.

His Duty, defined and enlarged upon, and particularly his duty to repudiate everything that savors of chicanery, and all appeals to unworthy prejudice, and see that no conviction shall take place except in strict conformity with the Law.—*Henwood v. People*, 544.

There was testimony tending to establish improper relations between the prisoner and the woman in the case; also testimony tending to show that the deceased Von Phul was infatuated with the woman. The husband of the woman was a witness for the prisoner, and upon the conclusion of his testimony, in quitting the witness stand, stopped and shook hands with the prisoner. *Held* a proper matter of comment to the jury; but the District Attorney having referred to another case in which as he said the counsel for the prisoner had pursued the same tactics, and, as he claimed with success, the latter statement was held improper.—*Id.*, 544.

Argument to the jury that when the prisoner shot Von Phul, without justification and with deliberation and malice, and one of the bullets struck and caused the death of an innocent by-stander he was guilty of murder *held* proper, there being evidence to establish the matters of fact relied upon in the argument.—*Id.*, 544.

Defendant pleading self-defense the District Attorney commenting upon the instructions of the court that "great bodily harm" meant "a serious and severe injury," argued that the danger to be apprehended from Von Phul was not so imminent as to require the taking of his life, so that the accused was not entitled to plead self-defense. *Held* legitimate.—*Id.*, 544.

The District Attorney urged the jury to find the accused guilty of murder in the first degree and prescribe in their verdict the penalty of death, arguing that if men like the accused could go out and wreck homes, and thereafter shoot in the back men of whom they were jealous, and shoot indiscriminately into a crowd, and then be turned loose, there would be no safety for law-abiding citizens; and that there would be no necessity for courts or juries unless in such case, an example was set. *Held* there being testimony to support all the matters of fact so urged upon the jury, the argument was no more than an appeal to them to discharge their duty.—*Id.*, 544.

The coat worn by Von Phul at the time of the shooting was in evidence and it was claimed by the prisoner that a hole in it corroborated the testimony of the prisoner that he shot in self-defense. One of the attorneys for the prisoner had had the coat in his possession—always in the presence of others. The District Attorney argued that

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DISTRICT ATTORNEY—Cont.
what was claimed to be a bullet-hole was in fact a knife-cut, and insinuated that defendant's counsel could have made it. This being assigned for error *held* it was for the jury to determine how the hole was made, its appearance was a proper matter of comment and it was not improper to call the attention of the jury to the question.

In view of the fact that counsel for the prisoner were, throughout the trial, vigilant to protect his rights, and that the court repeatedly admonished the jury not to accept as evidence the opening statement or the arguments of counsel, it was concluded that in determining the guilt or innocence of the prisoner the testimony alone was considered. —*Id.*, 544.

DISTRICT COURT.

Jurisdiction—The district court has jurisdiction of a bill to enforce the specific performance of an agreement to make provision by will for a person named, instituted by the beneficiary, against the executor, and legatees who have received allowances out of the estate to the prejudice of the beneficiary in such contract. Sections 7141-7146, 7254 of the Revised Statutes have not the effect to confer exclusive jurisdiction of such an action upon the County Court.—*Oles v. Wilson*, 246.

DIVORCE AND ALIMONY.

Non-Support—Under Rev. Stat. § 2112 the wife's complaint may allege non-support by the husband, he being in good bodily health, "for more than one year," even though this may require the husband to justify or excuse his conduct for any number of years.—*Rogers v. Rogers*, 132.

Complaint—The wife's complaint for divorce alleged that she was living apart from her husband, and, besides other wrongs and neglect, that on various occasions the husband, without cause or excuse, had left her, and absented himself from the state for months, making no provision for the support of his family, and that plaintiff had been compelled to earn money by her own labor, for the support of herself and their child. *Held* to sufficiently show that the wife was justified in living separate and apart from the husband.—*Rogers v. Rogers*, 132.

ELECTIONS.

Ballot—How the Voter Shall Express His Choice—The voter must substantially observe the requirements of the statute.—*Bromley v. Hallock*, 148.

Where the voter writes in the blank above the list of nominations, the name of a particular party, he indicates an intention to vote for all the candidates of that party named upon the ballot, unless, in the

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ELECTIONS—Cont. LLLLLLL

way provided by the statute, he manifests a different intention, *i. e.*, by inserting an X opposite the name of an opposing candidate, or if there are two or more candidates for the same office, by drawing a line through the name of those, or the one, for whom he does not desire to vote.—*Id.*, 148.

The contestor was a candidate upon the ticket of the Progressive party. Several voters wrote at the top of the ballot the name of this party, as well as the name of another party which had made no nomination for the office for which the contestor was a candidate, and none of these ballots bore any X opposite or near to the name of any candidate for that office. *Held* that the insertion of the names of the other parties, in addition to the Progressive party, did not tend to contradict or neutralize the purpose of the voter to cast his ballot for contestor and that the ballots must be counted accordingly.—*Id.*, 148.

Under §§ 2235, 2259 of the Revised Statutes and § 1 of the Headless Ballot act (Laws 1913, p. 685) the voter is required to express his choice by making an X in the space left for the purpose, opposite the name of the candidate for whom he desires to vote.—*Riley v. Trainor*, 155.

There being three candidates for the office in question, sundry voters wrote in the spaces left for this purpose, under the word indicating the office, the names of three persons, among them the name of the contestor. No cross was set opposite the contestor's name upon any of these ballots. *Held* they were not to be counted for contestor. *Baldwin v. Wade*, 50 Colo. 107, distinguished.—*Id.*, 155.

Contest—Statement of Contest—Amendment—The provision of Rev. Stat. § 2312 that where the reception of illegal votes is the ground of contest a list of the persons alleged to have voted illegally must be set forth in the statement of contest, is mandatory, and must be strictly construed. A defect in this respect cannot be amended.

The provisions of the Code of Civil Procedure have no application.—*Sugar City v. Crowley County*, 432.

EMINENT DOMAIN.

Powers of the Court—§§ 6592-6597 of the Revised Statutes are to be taken together. Thus construed they confer upon the District Court power to modify, recast, or annul, any assessment, and do everything necessary to make a true and just appraisement, according to the principles of the statute.—*Phipps v. Denver*, 205.

Where the boundaries of the district to which the assessment is limited, as by the proviso to Rev. Stat. § 6592, the court may, if the report departs from the statute, amend it in this respect, or may refer it to the same or another commission.

So where it appears that the commissioners acted under a misapprehension of the law.—*Id.*, 205.

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EMINENT DOMAIN—Cont.

Where the commissioners act under a misapprehension of law, the court may so modify their report as to make it comply therewith.—*Denver v. Lathan*, 371.

Where upon error to the order in such case no suggestion is made, nor authority cited, to show that the court erred in its conclusions either of law or fact, the order will be affirmed without investigation. —*Id.*, 371.

Objections to Report—Effect—Proceedings for the opening of an alley. The commissioners omitted to assess benefits against the corner lots, though abutting upon the alley. The owners of these lots made no objection to the report. *Held* that objections made by the holders of other lots in the block entitled the court to revise and correct the report in this respect.—*Phipps v. Denver*, 205.

Future Damages—All damages, present or prospective, which are the reasonable and necessary result of an improvement, are taken into account, and compensation awarded therefor; but not speculative damages which may by possibility result from future municipal action, for a different purpose.—*Moffat v. Denver*, 473.

Costs—Section 6598 of the Revised Statutes is not unconstitutional. *Dolores Co. v. Hartman*, 17 Colo. 138, and *Denver Co. v. Howe*, 49 Colo. 256, distinguished.—*Moffat v. Denver*, 473.

Statute Construed—It is not a necessary deduction from the proviso to § 6592 Rev. Stat. that the benefits to each owner in the block through which an alley is opened will be identical with the damages assessed to him for so much of his lot as is taken. That depends upon whether they are in fact the same, when ascertained in the manner prescribed by the statute.—*Phipps v. Denver*, 205.

It is not the purpose of the statute that the owners of the lots abutting upon the alley should bear the cost of the improvement in equal proportions; each of such property owners must bear some portion of the burden, but the ascertainment is not to be made upon the frontage merely, but according to the actual benefit occasioned to the property, as nearly as this can be ascertained.—*Id.*, 205.

Where the commissioners assessed no benefits against the corner lots, it was held that their report was a departure from the statute, and that the court was justified in a modification of the award in this respect.—*Id.*, 205.

EMPLOYMENT AGENCY.

Only within a city or town is a license to keep a private employment agency required.—*Koike v. People*, 414.

ENCUMBRANCE.

Easement—The right of way for an irrigating ditch is an encumbrance upon the land subject to such easement.—*Eriksen v. Whitescarver*, 409.

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EQUITY.

Laches—Delay in taking out alias process, as against one who during all the delay is without the jurisdiction is not laches.—*Kingsley v. Clark*, 352.

ESTOPPEL.

By Conduct—When one, with actual knowledge of the facts, induces another, by words or conduct, to believe that he approves or acquiesces in a transaction, and the other relying upon the assurance, alters his position, the former is estopped from repudiating the transaction, to the other's prejudice.—*Green v. Hulse*, 238.

The son, knowing that his mother, aged, infirm, and mentally unbalanced, contemplates the conveyance of real estate to another, upon the engagement of the other to support her during her natural life, approves the arrangement, and expressly consents thereto. He will not, after the death of the mother, be heard to assail such conveyance upon the ground of her mental incompetency.—*Id.*, 238.

Nor will his wife, who, having likewise assented to the transaction with full knowledge, has accepted the voluntary conveyance of the husband.—*Id.*, 238.

A municipal corporation issuing negotiable bonds for the purchase of water works, reciting full compliance with statutory requirements, will not be heard, as against a *bona fide* purchaser thereof, to deny that the ordinance authorizing the purchase was duly published.—*Hayden v. Aurora*, 389.

Who May Assert—A party will not be heard to charge his adversary by a supposed admission of what he has himself denied.—*Salisbury v. LaFitte*, 358.

EVIDENCE.

Judicial Notice, is taken of the facts upon which depends the question as to the adoption by the people of a proposed amendment to the constitution. And the court will resort to all sources of information which may afford satisfactory evidence upon the question.—*Harrison v. People*, 137.

Judicial notice taken, that in populous parts of a city, street car tracks may be, and are likely to be, used by children for play.—*Denver Tramway Co. v. Brown*, 484.

Of the trend of the times, that many respectable and moral people are urging that sex hygiene be taught in the public schools—*Chenoweth v. State Medical Board*, 74.

Competency—Action at common law to recover moneys paid to a carrier for the transportation of coal from certain stations named, to Denver, upon allegation that the rate exacted was excessive. *Held*, that plaintiff was entitled to show the rate charged by defendant upon

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EVIDENCE—Cont.
coal, from the same stations to Denver, when destined to points beyond Denver, and the usual rate for the transportation of coal for substantially the same distance for which that of plaintiff was carried, without first showing that the conditions of the carriage in such instances, were similar to those attending that in question, but subject to the right of the carrier to show dissimilarity in the conditions, as affecting the weight of the evidence, because such dissimilarity was peculiarly within the knowledge of the carrier.—*Kindel v. Colorado & Southern Co.*, 1.

Action to vacate a conveyance of lands, made upon the consideration that the grantee shall support the grantor. Evidence that the grantor executed the deed of her own volition, that her subsequent dissatisfaction was produced by the efforts of other relatives, and evidence tending to show performance by defendant of his promises, is competent, and its exclusion error.—*Martinez v. Martinez*, 292.

Action for negligence in unnecessarily detaining at a railway station a car containing dynamite, consigned to another station; in not placarding the car with notice of its contents; not attempting to remove it after a fire had broken out in the vicinity; and in not notifying those engaged in attempting to suppress the fire of the dangerous contents of the car. An ordinance of the city regulating the storage of explosives is not admissible.—*Wilson v. Colorado & Southern Co.*, 303.

Action by the heir to recover from the widow and administratrix of a decedent one-half the value of certain promissory notes. The widow alleged a parol gift to her by the husband. Certain mortgages whereon was written an assignment to the wife, subscribed by the husband in his lifetime, were held admissible for the purpose of identifying the notes.—*Lane v. Lane*, 419.

In the same case *held* that under subdivision 7 of § 7267 Rev. Stat. as amended by c. 229 of Laws of 1911, the testimony of the widow in the County Court, when cited and examined under Rev. Stat. § 7253 was admissible in her behalf.—*Id.*, 419.

Admissibility—Action for an injury to a child, while playing in the street, attributed to negligence in the management of a street railway car. A witness for the defense was cross-examined as to statements attributed to her, as made to one Fuller, on the day of the accident. She denied making the statement. Fuller, examined in rebuttal affirmed the making of the statement by the former witness, and testified that on that occasion, she declared that the defendant was to blame, that they did not give the child any chance to get away. On the authority of *Denver v. Lomovt*, 53 Colo. 292, the testimony was held properly admitted.—*Denver Co. v. Brown*, 484.

Public Records and Documents—The Reports of the Supreme Court, published by the authority and command of the law, are competent evidence of the determinations of that court in a particular cause,

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EVIDENCE—Cont.
where, in another cause, such determination is in issue.—*Keeler v. Hoyt*, 120.

The certificate of the secretary of state to the published volume of the Revised Statutes is not affected by the statement contained in the note at the foot of § 29 of art. VI of the constitution. The extent of his official duty was to place the constitution in the volume, and it was not within his function to cast doubt upon his own work.—*Harrison v. People*, 137.

Admissions of counsel, that a supposed enactment is invalid or their agreement as to facts which render it so, will not be accepted. —*Harrison v. People*, 137.

Parol Admissible—The facts from which the law raises a resulting trust in lands may be proven by parol.—*McPherrin v. Fair*, 333

Witness—Competency—The defendant is not a competent witness in his own behalf as to facts occurring before death where the plaintiff sues as executrix.—*Keeler v. Hoyt*, 120.

Examination of Witness, as to his occupation and antecedents is proper, as bearing upon the credit to be accorded to his testimony.—*Henwood v. People*, 544.

Discrediting Witness—A witness held discredited by his criminal conduct in the fraudulent alteration of a deed.—*McPherrin v. Fair*, 333.

Measure of Proof Required—To vacate a deed duly executed, clear and convincing evidence is required. The facts relied upon must be established beyond reasonable doubt.—*Martinez v. Martinez*, 292.

EXECUTIONS.

Real Property—Liability to Execution—The inchoate interest of a purchaser of lands, under an executory agreement for the future conveyance thereof, is liable to execution.—*Salisbury v. LaFitte*, 358.

Sale of Land—Effect—A sheriff's deed of lands where a levy is made under Rev. Stat. § 3637, takes effect by relation as of the day on which the certificate of levy is filed.—*Id.*, 358.

The purchaser at the execution sale succeeds to all the rights of the defendant in execution. Where the defendant in excution holds under an uncompleted executory agreement of purchase, the purchaser at the execution sale acquires the right to proceed with the contract of purchase of which he has so become the involuntary assignee, to make the payments stipulated for in such agreement of purchase, and perform the covenants of the execution defendant therein.—*Salisbury v. LaFitte*, 358.

The defendant in execution is under no duty to continue such payments, and payments made by an assignee of the execution defendant whose right is subordinate to that of the execution plaintiff, do not enure to the benefit of the purchaser at the execution sale.—*Id.*, 358.

Against the Body, is not to be awarded upon judgment by default,

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EXECUTIONS—Cont.
unless expressly demanded in the complaint, even though the complaint states a cause of action entitling plaintiff to the process if it had been prayed (Rev. Stat. § 3024, Rev. Code § 186).—*Jahl v. Lewis*, 109.

Action for deceit. Verdict for plaintiff, declaring that "said defendant is also guilty of fraud and willful deceit," entitles plaintiff of the award of an execution against the body of defendant.—*Mitchell v. Crowe*, 405.

EXECUTIVE OFFICERS. See *AUDITOR AND TREASURER.*

EXECUTORS AND ADMINISTRATORS.

Exhibition of Claims—If the claim is based upon a promissory note, the note itself must be presented and filed in the court. Rev. Stat. § 7212.—*First National Bank v. Cone*, 529.

Waiver—The endorsement of the word "disallowed" by the executrix upon a claim founded on a promissory note, and not exhibiting the note, is no waiver of the omission to file the note.—*Id.*, 529.

Objections to Claim, need not be specified.—Id., 529.

FRAUD.

Pleading—Action to annul a contract for fraud. The complaint set forth the alleged false and fraudulent representations, plaintiff's reliance thereon, his ignorance of the facts, and that he was deceived and misled by such false representations. *Held* sufficient.—*James v. Aspelin*, 381.

The facts constituting the fraud must be set forth. A general allegation of fraud is a mere conclusion.—*Martinez v. Martinez*, 292.

Ratification—One who having been induced by fraudulent and false representations to enter into an executory contract, insists upon the perfomance thereof after he has full knowledge of the facts constituting the fraud, thereby ratifies the contract, condones the fraud, and is barred of an action for the demages resulting therefrom.—*Ponder v. Altura Co.*, 519.

The ratification takes effect from the date of the contract and purges it of the fraud.—*Id.*, 519.

Without Damage, not actionable.—*Id.*, 519.

Contract Induced by Fraud—Assignment and Reassignment—Effect—Plaintiff sued to vacate a contract alleged to have been induced by fraud. It appeared by the reply that prior to the discovery of the fraud he had assigned the contract to a third person, and this, it was contended, destroyed his right of action. Considering that the assignment was procured by defendants, was without consideration, and a continuance of the fraud, and that prior to the institution of his action plaintiff had procured a reassignment, and so placed himself in position to be able to surrender whatever he might have acquired in the fraudulent transaction, the contention was repelled.—*James v. Aspelin*, 381.

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FRAUDULENT CONVEYANCES.

Intent—A merchant's transfer of his stock of merchandise to a trustee, for its full value, and in good faith, for the protection of all his creditors, is unassailable. Such a sale is not within Rev. Stat. § 2678.—*Blanke Company v. Sargent*, 299.

The transfer of the stock of a merchant, not in the ordinary course of trade, is only *prima facie* evidence of a fraudulent purpose.—*Id.*, 299.

INFANTS.

Custody—In proceedings affecting the custody of an infant the paramount and controlling consideration is the welfare of the child.—*The People ex rel. v. Parks*, 458.

Right of Parent—The right of the parent to the custody of the child is not an absolute right, and will never be enforced where opposed to the interest and welfare of the child.—*People ex rel. v. Parks*, 458.

The mother of a child sued to obtain its custody. It appeared that her purpose was to deliver the child to a third person. This fact was held to eliminate from consideration the claim of the mother, and that the case was governed by the general rule.—*Id.*, 458.

INJUNCTION.

Complaint, praying an injunction to restrain the diversion of water to the prejudice of plaintiff, held sufficient.—*Larimer County No. 2 Co. v. New Cache La Poudre Co.*, 233.

INSTRUCTIONS.

Construction—Are to be construed as a whole.—*Forte v. People*, 450.

Objections to, not presented at the time the charge is given cannot be assigned for error.—*Rogers v. Rogers*, 132.

INSURANCE.

Application for Policy, made after the issuance of the policy, and without any agreement that it shall be made, is no part of the contract. The case ruled by the judgment in *Connecticut Company v. Colorado &c. Co.*, 50 Colo. 524.—*Colorado Leasing Co. v. Palatine Co.*, 235.

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JUDGMENT.

When Conclusive—Action to vacate a judgment reviving a former judgment, and the sale of lands upon execution issued pursuant to the judgment of revivor. A judgment therein sustaining a demurrer to complaint, and directing a discontinuance, is no bar to a subsequent action by the same plaintiff for possession of the same lands, under a subsequently acquired title.—*Salisbury v. LaFitte*, 358.

Plaintiff was arrested, imprisoned and convicted of the violation of an ordinance. He afterwards brought his action against the city for such arrest, detention and imprisonment, alleging that the ordinance under which the proceeding was had was void for want of publication. *Held* that the validity of the ordinance was a question within the jurisdiction of the magistrate, before whom it was arraigned, and no appeal having been taken from the judgment of conviction it was not subject to collateral attack.—*Forman v. City of Central*, 535.

Vacating—Lapse of Term—As a general rule, in the absence of a statute to the contrary, the courts have no control of their judgments after the lapse of the term at which the judgment is rendered, except to correct clerical errors, and to afford relief where fraud or the absence of jurisdiction is alleged.—*Empire Co. v. Crawford*, 281.

Sections 81 and 231 of the code contain the only statutory authority for granting relief against a judgment after the expiration of the term at which it is rendered.

Where the jurisdiction is unquestioned, and no fraud in obtaining the judgment is alleged, the application under § 81 must be made with reasonable diligence, and in any event within six months after the adjournment of the term. Thereafter, except for the correction of clerical errors, the court is without power to interfere and any further action is a nullity.—*Id.*, 281.

Final—What is—See APPEALS AND ERROR.

JURY.

Summoning—Chapter 159 of the Acts of 1911 providing for the appointment of a jury commissioner in every county having a population of one hundred thousand or more, in no manner contravenes the constitutional provision against special laws.—*Henwood v. People*, 544.

Examination of Juror on Voir Dire—Defendant's counsel had been permitted to examine a member of the jury by hypothetical questions, involving the defense of the accused. *Held* that the prisoner could not complain of questions afterwards propounded by the district attorney, in line with those of his own counsel.—*Henwood v. People*, 544.

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LIMITATIONS.

Color of Title—To give color of title the instrument relied upon must be good in point of form, must profess to convey title, and must be properly executed. A treasurer's deed not under his official seal, when this is required by statute, does not amount to color of title.—*Dussart v. Abdo Co.*, 423.

Color of title is unavailable when acquired with knowledge of its invalidity. The assessment roll and certificate of sale described the property as situate in a town which had no existence. One of the purchasers was an attorney. *Held* impossible to conceive of good faith, in reliance upon a deed, based upon such certificate, and assuming to convey other and different property.—*Id.*, 423.

Statute of Non-Claim—A bill for specific performance of a contract to provide by will for a person named, is not within the provisions of Rev. Stat. § 7206. The phrase "all demands" in the first clause of the section includes only the demands of widows, orphans and creditors. Demands of this character must be satisfied in advance of distribution. The right of the beneficiary in such a contract as supposed is an equity in what remains after all such demands as mentioned in the statute are adjusted and paid, and can be asserted only in a court of original and general equitable jurisdiction.—*Oles v. Wilson*, 246.

Action Pending—By the filing of a complaint the court acquires jurisdiction of the subject matter of the cause therein set forth. Where the original summons is returned not found as to one or more of the defendants, and judgment given against others who are served, the action is still a depending cause as to the defendants not served, and is continued from term to term, by operation of law, though no formal order of continuance is made. Alias summons may be issued at any time; and service upon them even after the lapse of many terms gives jurisdiction of the person of the defendants so served.—*Kingsley v. Clark*, 352.

LUNATICS.

Conveyances by—The great weight of authority is that the deeds of persons in fact insane, but not so adjudged, are voidable and not void.

When such a conveyance comes in question the inquiry should not be limited to the mental condition of the donor, but the circumstances attending the transaction and the conditions under which the deed was executed should be investigated. If upon a valid consideration, without fraud upon or undue advantage taken of the grantor's condition, if the transaction was fair and for the interest of the grantor, it should be sustained.

To exclude evidence of these circumstances and conditions, *is error.*—*Green v. Hulse*, 238.

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LUNATICS—Cont.

Who May Assail the Conveyance—The deed of a lunatic is not open to assault by any one and every one. The heir at law may contest its validity if he has not in some way precluded himself from taking such action.—*Green v. Hulse*, 238.

MAXIMS.

Cases Illustrating—Consensus tollit errorem.—Louden Co. v. Berthoud, 374.

Falsa Demonstratio non nocet.—Derham v. Hill, 345.

Volenti non fit injuria.—Ponder v. Altura Co., 519.

MINING CLAIMS.

Application for Patent—Adverse Claim—Equitable Defense—Where it appears that whatever right the plaintiff in an adverse suit has in the premises in controversy is equitably the property of the defendant, a non-suit should be entered. It is not necessary to call a jury. It is proper to determine the issues raised upon the equitable defense, in the first instance.

The court may require the adverse claimant to convey to the applicant for patent.—*Cuenin v. Chloride Co.*, 320.

Adverse Claim—Waiver—An adverse claim may be waived by a failure to file it within the statutory period, by voluntary dismissal in the land office, by a conveyance to the applicant for a patent, or by discontinuance of the action brought to support it.—*Id.*, 320.

MUNICIPAL CORPORATIONS.

Powers—Nothing in §§ 5036 or 6525, cl. 10, 54, confers power upon a city to compel the owner of a lot on which is standing an unused privy, with no other building or structure, to connect such privy with the public sewer.—*Gault v. Fort Collins*, 324.

Duty as to Condition of Streets—Municipal corporations are required to construct their streets, and maintain them, under all circumstances, in reasonably safe condition for ordinary travel by those using due care in traversing the particular part of the highway which may be in question. Under no condition can a municipality be regarded as an insurer to those using the streets.—*Pueblo v. Smith*, 500.

Streets—Franchises Granted Therein—The prime purpose of a street is to provide a way for public travel; an easement in the subsurface, even for lawful purposes is not an absolute right, but subordinate to the rights of the public therein, and subject to the powers of the municipal authorities to make such reasonable improvement or changes therein as in their judgment the public interest demands. —*Moffat v. Denver*, 473.

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MUNICIPAL CORPORATIONS—Cont.

A water company had laid pipes for the conduct of water through the streets of a municipality whose inhabitants it served; this by authority of a franchise granted by the municipality, and without any provision that the pipes when laid should not be disturbed. Upon the excavation of the street by the city to form a subway, in order to avoid grade crossings of certain railroads, it became necessary to remove the conduit and locate it at great expense upon another route. The water company was denied compensation for the expense so necessarily incurred.

By an ordinance adopted subsequent to the commencement of the work, and an agreement pursuant thereto, it was provided that the railroad companies, a certain tramway company, and the city, should each bear one-third of the expense of the improvement, and that the tramway company should have the right to use a specified width of the subway, on one side thereof for the passage of its cars, and should maintain this portion of the subway in repair, the same being separated from the residue by a fence. It did not appear nor was it claimed that if the city had constructed the subway at its own expense, the grade or dimensions would have been different from those specified in the contract. *Held* that inasmuch as the franchise granted to the tramway company had in no way increased the burdens of the water company, it afforded no change in the rule.—*Id.*, 473.

Certain engineers testifying as well for the water company as for the city agreed that at another location the damages to the water company would have been less; but *held* that the judgment of the city authorities as to the location of the improvement was conclusive unless it was made clearly to appear that their selection of the route was unreasonable, or dictated by some fraudulent purpose; there being no evidence of this character, nor what it would have cost to construct the subway over the other route, the claim of the water company that it was unnecessarily damaged by the location of the subway at the point selected was rejected.—*Id.*, 473.

Annual Revenue to be Applied to Annual Expenses—Under Rev. Stat. secs. 6631-6633, the annual revenue of every municipal corporation must be applied to discharge the expenses of the corporation during the year in which it is raised, and may not be applied to any other purpose, until the expenses of the year to which the funds belong have been satisfied.

Secs. 6644, 6645, 6647 are to be construed in connection with section 6631, and so construed merely require that warrants drawn on the funds of a particular year must be paid in the order of registration, out of the funds of that year applicable to the purpose. *People v. Austin*, 11 Colo. 134, distinguished.—*Ostling v. People*, 22.

Contracts—Validity—A city is not to be charged by implication but only upon express contract.—*Colorado Springs v. Pike's Peak Co.*, 169.

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MUNICIPAL CORPORATIONS—Cont.

Contracts—Construction—What is received by a city for the grant of a franchise is to be considered in interpreting the provisions thereof imposing duties upon the grantee.—*Colorado Springs v. Pike's Peak Co.*, 169.

Contracts—Construed—The city, by ordinance, granted to Jackson the right and privilege of erecting and operating within its limits, a plant for the production and distribution of the electrical current, the right and privilege to construct, maintain and operate dams, ditches, flumes, pipe-lines, and conduits, for the transmission of such current, and the right to divert and use, under certain conditions, for the generation of electricity, the waters of the streams, pipes and conduits of the city. Jackson, on his part, among other things, agreed to complete by a day named a certain tunnel for conveying water to the city, and, by section 9 of the ordinance, to furnish to the city "such arc lights * * * as may be required by such city for lighting its streets," at a specified rate; also to furnish to the city, free of cost, electricity for lighting the buildings of the city, and "such electrical power * * * as the city may specify * * * not to exceed fifty horse-power;" and to at all times during the term of the grant "furnish to the city" on a certain notice and demand "such other power as may be required for municipal purposes at the same price paid by the most favored customer." *Held* that the city was entitled to demand from the defendant, successor in interest of Jackson, and as against the intervenor, the most favored customer of defendant, electric power to the volume of 10,000 kilowat hours per day, for the purpose of lighting the streets, parks, buildings and other public places of the city, and the residences and places of business of its inhabitants, at the same rate and price paid by the intervenor; that such purposes were municipal in character, within the meaning of the ordinance, and that such demand was not in contravention of any right or privilege granted to Jackson by the ordinance, or any agreement of the city therein contained; that the most favored customer having notice of the terms of the ordinance, at the time of entering into its contract with the defendant, was affected by its provisions; that the ordinance contained no express agreement of the city to take from Jackson any electrical current whatsoever for lighting its streets or public places, and that such agreement was not to be implied; that the city was not required to take, or agree to take, the same minimum annual volume of the electrical current as contracted for by the intervenor; that the price to be paid by the city was the same as stipulated for by the intervenor, and to be diminished or increased according to the schedule set down in the intervenor's contract, according to the monthly consumption; and finally that the defendant was not entitled to contend that no vote of the electors of the city had been had, authorizing the construction and maintenance of an electric lighting plant.—*Colorado Springs v. Pike's Peak Co.*, 169.

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MUNICIPAL CORPORATIONS—Cont.

Municipal Bonds—Bona Fide Purchasers, may rely upon the recitals thereof.—*Hayden v. Aurora*, 389.

Liability to One Prosecuted for the Violation of a Void Ordinance—Plaintiff declared against the city for an unlawful arrest, and his detention in jail over one night, for the alleged violation of an ordinance, void for want of publication, alleging that the jail where he was incarcerated was a cheap wooden affair, liable to catch afire; that during the night of his detention therein, he was compelled to arise and rebuild the fire, that during his imprisonment he was deprived of the exercise necessary to his health and comfort; that while in the jail he was searched for fire-arms; that his trial, against his protests, was conducted in the presence of the police judge, and about 500 citizens. *Held* that the validity of the ordinance not being an open question, upon the record even though the city could be held liable for the misconduct of its officers, which was not determined, nothing in the complaint entitled plaintiff to an award of damages.—*Forman v. Central City*, 535.

Ordinance—Prosecution—An ordinance provided that "Every privy belonging to any resident, etc., located upon any lot abutting upon or near any street or alley through which is a sanitary sewer shall be connected by the owner, etc., with such sewer." In a prosecution to recover the penalty described for a violation of this ordinance the court will not consider the regulations of the Board of Health, nor those for the abatement of nuisances.—*Gault v. Fort Collins*, 324.

NEGLIGENCE.

Unforseen Results—Municipal corporations are required to guard against such dangers as can, or by the exercise of reasonable prudence ought to be anticipated; and where an accident happens to a traveler from some slight defect from which, according to common experience, danger is not to be reasonably anticipated, the municipality is not chargeable, e. g. where one, riding a bicycle over a viaduct, is thrown by reason of an inequality in the thickness of the planks by which the viaduct is covered, varying from one-fourth to three-fourths of an inch. —*Pueblo v. Smith*, 500.

Imputed—The negligence of a parent in permitting a young child to play in the public street, where street cars are operated, is not to be imputed to the child.—*Denver Tramway Co. v. Brown*, 485.

Negligence of Defendant Concurring with Wrongful Act of a Stranger—Where injury occurs by the negligence of the receiver of a railway, and the wrongful act of another, for whose conduct neither the receiver nor the injured person is liable, the receiver is chargeable if the injury would not have occurred but for his negligence.—*Wilson v. Colorado & Southern Co.*, 303.

For the Jury, as a rule; otherwise where the facts are not in dis-

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NEGLIGENCE—Cont.
pute, or upon the evidence negligence or the absence of negligence is evident and unquestionable.—*Pueblo v. Smith*, 500.

Pleading—The negligent leaving of a railway car containing high explosives in large qauntities where human life may be endangered, is a nuisance. In an action for the death of one who, without fault on his part, was killed by the explosion of the contents of the car, it is not necessary to allege or prove the immediate cause of the explosion. —*Wilson v. Colorado & Southern Co.*, 303.

See Common Carrier—Street Railway Co.—Railroads.

NEGOTIABLE INSTRUMENTS.

Parol Condition—Promissory note delivered upon a parol condition that it shall be without effect in a certain event. The event specified occurs. Under Rev. Stat. § 4479 no action lies thereon by payee against maker.—*Sayre v. Leonard*, 116.

Promissory Note—Payable Without Defalcation—The words are mere surplusage; they have not the effect to waive set-offs.—*First National Bank v. Lewis*, 124.

Assignment by Delivery—Under Rev. Stat. § 4512 the owner of a negotiable instrument may pass such title as he has, by mere delivery for value, without endorsement.

And, generally speaking, independent of statute, where the right of no creditor is involved, delivery for value or by way of gift has the same effect.—*Lane v. Lane*, 419.

Rights of Assignee—The State Bank assigned to the plaintiff, after maturity, a promissory note of defendant. The bank was then insolvent, and on the following day closed its doors. Defendant, at the time, had on deposit in the bank a sum in excess of the amount due upon his note. *Held* that in an action by the plaintiff upon the note defendant was entitled to set off the amount of the note.

The common law rule that the indorsee of an overdue promissory note takes it exempt of all equities which do not attach to or inhere in the note itself, at the time of the transfer, is so modified by the code that all equities existing between the maker and payee, at the time of the assignment, or notice thereof, avail to the maker, in an action by the assignee.—*First National Bank v. Lewis*, 124.

NEW TRIAL.

Motion—Assignment of Grounds—All errors relied upon as ground of a motion for a new trial should be specifically set forth. Any error not so presented should be regarded as waived.—*First National Bank v. Lewis*, 124.

Prior Opinion of Juror—Affidavits—The examination of the juror upon the *voir dire*, had not been preserved. In support of his motion

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NEW TRIAL—Cont.
for a new trial the accused deposed, that on such examination one of the jurors stated that he had formed no opinion. Other affidavits disclosed that the juror had both formed and expressed the opinion that the accused was guilty. The juror himself, other jurors, and the district attorney, made affidavits that, upon his examination, he declared that he had formed and expressed an opinion which it would require evidence to remove, but if accepted he would set his opinion aside, and try the issue upon the merits, and that the accused passed the juror for cause. *Held* that the juror was not shown to be disqualified and the court declined to disturb the findings of the District Court, to this effect.—*Forte v. People*, 450.

NON-SUIT.

As to One Defendant—Effect—Several joined as defendants in an action for a tort. Non-suit as to one does not determine the cause as to the others.—*Wilson v. Colorado & Southern Co.*, 303.

PARTIES.

Defendants—Necessary—The bill being brought to enforce a contract to make provision by will for the plaintiff the court said that it would have been proper to have joined as defendant, all the legatees named in the will; but the residuary legatees to whom the great bulk of the estate was devised, being joined, it was said that to bring in the others would in nowise benefit the executor. His demurrer upon this ground was therefore overruled.—*Oles v. Wilson*, 246.

Defendants—Joint Torts—Certain railway tracks of the Colorado & Southern Company were operated jointly by that company and the receiver of the Colorado & Northwestern Company. By the negligence of the receiver plaintiff's intestate came to his death. The title of the Colorado & Northwestern Company ws afterwards purchased by the D. B. & W. Co. at a sale made pursuant to the decree in a foreclosure suit in which the receiver was appointed, "subject to the liabilities of the receiver incurred in operating," etc. *Held* that the Colorado & Southern Company having admitted the receiver to a joint occupation of the tracks, with itself, it was liable for his neglect; that the D. B. & W. Co. was liable, by the terms of its purchase; that each being liable for the same event, they were properly united, and there was no misjoinder either of parties or causes of action.—*Wilson v. Colorado & Southern Co.*, 303.

Bringing in New Parties—The provision of the code (§ 16) requiring new parties to be brought in has reference only to indispensable parties.—*Oles v. Wilson*, 246.

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PATENTS FOR INVENTIONS.

Assignment—Validity—Under § 4898 of the Revised Statutes of the United States no assignment of a patent for an invention, or of an interest therein, can be said to be valid, unless recorded in the patent office within three months from the date thereof.

Plaintiff in his complaint demanded certain moneys as stipulated to be paid for an interest in a patent for an invention. He claimed by assignment from the inventor and patentee, but was not able to produce any assignment. No assignment to him had ever been recorded, and though he had covenanted to deliver to defendant, free of encumbrance "all right" to the patent, within the State of Colorado, he was in no position to comply with his covenant. *Held*, he was not entitled to recover any share of the stipulated purchase price.—*Strauss v. Brier*, 63.

PERSONAL LIBERTY.

EXECUTION AGAINST THE BODY. See *EXECUTIONS.*

PLEADING.

Certainty—Every litigation should be founded upon some definite theory, and the complaint should state the facts essential to support such theory.—*Martinez v. Martinez*, 292.

In Pleading Fraud, the facts constituting the fraud must be alleged, in order that the court may determine the character of the transaction. A general allegation of fraud is a mere conclusion.—*Id.*, 292; *James v. Aspelin*, 381.

Construction—A complaint for negligence in general and comprehensive terms, capable of being readily understood, and not so general as to mislead, is not subject to a general demurrer; nor to a special demurrer for ambiguity in failing to state with particularity the manner in which defendant was negligent, or the like.—*Fox v. Denver Tramway Co.*, 511.

Construed—Action against a railway company under Rev. Stat. § 2056, the complaint alleging that the train whereon deceased was being carried "was by defendant and its officers, agents and servants so negligently, carelessly and unskillfully operated that it collided with another train." *Held* that the charge of negligence against the company itself was mere surplusage, not impairing the effect of the allegation of negligence by the officers, agents and servants; that the word "operated," included everything contained in the expressions of the statute, and that everything necessary to maintain the action under the statute was sufficiently stated.—*Denver and Rio Grande Co. v. Frederic*, 90.

A claim upon a promissory note being exhibited against the de-

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PLEADING—Cont.
cedent's estate, the executrix filed her bill in equity against the payee, and other subscribers to the note, asserting that decedent subscribed, merely as surety. The filing of the claim was admitted, but there was no admission that the note had been filed or exhibited. *Held* she was not estopped to plead the limitation declared in Rev. Stat. § 7206.—*First National Bank v. Cone*, 519.

Action for causing the death of plaintiff's husband by the negligent operation of a street railway car. The complaint alleged that at or about the place where deceased attempted to board the car, defendant had placed a sign "Cars Stop Here;" that while the car was approaching the place of the sign "at a comparatively slow rate," deceased signalled the motorman, in the usual manner, to stop the car; that when the car reached him deceased "attempted to board it in the usual manner; that defendant well knowing that deceased was about to board said car, negligently failed to stop the car, but continued the motion thereof, and negligently increased its speed, whereby without negligence on his part deceased was violently thrown off said car." *Held* that the word "attempted," considered in connection with the context, clearly indicates a physical act; and because it is alleged in the same sentence that deceased was violently thrown off, etc., the allegation "was about to board said car" plainly means "was in the act of, etc." and not a mere mental purpose or intent, that the gist of the complaint is that defendant knowing that deceased was in the act of boarding the car, negligently increased its speed, with the result complained of.—*Fox v. Denver Tramway Co.*, 511.

An objection that the complaint fails to state how defendant's negligence was the direct and proximate cause of the injury was *held* sufficiently answered by the allegation; "whereby deceased was violently thrown off said car."—*Id.*, 511.

The manner in which deceased attempted to board the car was held to be sufficiently alleged, because "the usual manner" of boarding a car may be said to be a matter of general knowledge. The allegation that the car was approaching "at a comparatively low rate of speed" *held* to import that a person of ordinary prudence might attempt to board it with a reasonable probability of safety, and further that the allegation relates to a matter peculiarly within the knowledge of defendant, and for this additional reason the facts were sufficiently alleged.—*Id.*, 511.

Contracts Set Out in Haec Verba—Action upon a contract. The answer denied the contract and set out *in haec verba* what it alleged was in fact the agreement. *Held*, that defendant was entitled to show that the contract set up in the answer was in truth that upon which the minds of the parties met; the fact that the contract as pleaded by defendant was identical with that alleged by plaintiff, save as to a certain erasure made before delivery, did not require any different

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PLEADING—Cont.
or more particular method of averment than that adopted by the answer.—*Divide Co. v. Tenney*, 14.

Reply—A reply which directs itself only to "all new matter in said answer contained," is vulnerable to a motion to make more specific; but if not so assailed it suffices to put in issue the affirmative averments of the answer.—*Wilson v. Colorado & Southern Co.*, 303.

Amendment—The amendment of a pleading rests in the discretion of the trial court, and its action will not be reviewed unless an abuse of the discretion appears.—*Rogers v. Rogers*, 132.

Where in a special proceeding the statute makes no provision for amendments, those of a substantial character are not to be allowed. —*Sugar City v. Crowley County*, 432.

Supplemental—A supplemental cross-complaint filed without leave may be stricken from the files.—*Rogers v. Rogers*, 132.

An application for leave to file a supplemental cross-complaint not supported by affidavit is properly refused. (Code § 80.)—*Id.*, 132.

Prayer—Execution Against the Body, is not to be awarded upon judgment by default, unless expressly demanded in the complaint, even though the complaint states a cause of action entitling plaintiff to the process if it had been prayed (Rev. Stat. § 3024, Rev. Code § 186).—*Jahl v. Lewis*, 109.

Counterclaim, as used in § 63 of the Revised Code, is a broader term than set-off or recoupment, and includes both of them.—*First National Bank v. Lewis*, 124.

The State Bank assigned to the plaintiff, after maturity, a promissory note of defendant. The bank was then insolvent, and on the following day closed its doors. Defendant, at the time, had on deposit in the bank a sum in excess of the amount due upon his note. *Held* that in an action by the plaintiff upon the note defendant was entitled to set off the amount of the note.

The common law rule that the indorsee of an overdue promissory note takes it exempt of all equities which do not attach to or inhere in the note itself, at the time of the transfer, is so modified by the code that all equities existing between the maker and payee, at the time of the assignment, or notice thereof, avail to the maker, in an action by the assignee.—*Id.*, 124.

Special Demurrer, and Motion to Make More Specific are substantially concurrent remedies.—*Fox v. Denver Tramway Co.*, 511.

Waiver—Application under § 81 of the code to vacate a judgment, presented after the lapse of more than six months from the adjournment of the term. The absence of jurisdiction in the court is not waived, either by a motion to strike off the application, or by a demurrer to the answer of the applicant, filed under leave granted pursuant to his application, nor by answering to the merits after the overruling of the demurrer.—*Empire Co. v. Crawford*, 281.

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POLICE POWER. See *CONSTITUTIONAL LAW.*

PRACTICE IN SUPREME COURT. See *APPEAL AND ERROR.*

PRECEDENTS.

Opinion Often Cited, will nevertheless be overruled if, on more mature consideration, found to announce heretical doctrine, in the absence of special reasons for applying the maxim *stare decisis.—Imperial Co. v. Morris*, 194.

Construction—Every opinion of the courts is to be construed in the light of the facts and circumstances of the case, giving each fact and circumstance its due weight.—*Derham v. Hill*, 345.

PRINCIPAL AND AGENT.

Duties and Disabilities of Agent—One employed to purchase lands for another is not at liberty to take title thereto in his own name or in the name of another for his use.—*McPherrin v. Fair*, 333.

PROMISSORY NOTES. See *NEGOTIABLE INSTRUMENTS.*

PUBLIC LANDS.

Unauthorized Action of Officials—The action of the officers of the land department of the United States, beyond the scope of their authority, is void. A patent for lands which had been previously granted, reserved from sale, or appropriated may be annulled by the courts; otherwise the injured party would be without redress.—*Anderson v. Woodward*, 53.

QUIETING TITLE.

Water Rights—In this jurisdiction a bill to quiet title to a water right, and enjoin interference therewith will be entertained. Vague and uncertain provisions of the contract under which the plaintiff claims are no bar to the relief.—*New Brantner Co. v. Kramer*, 218.

RAILROADS.

Liable for Negligence of Lessee—A railroad company which admits another to the joint use of its tracks is liable for the negligence of the one to which such permission is extended, in the operation of its trains thereon.—*Wilson v. Colorado & Southern Co.*, 303.

RATIFICATION. See *CONTRACTS, FRAUD.*

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RECEIVERS.

Negligence Not Chargeable to the Property Owner—In the absence of a statute to the contrary a railway company is not liable for the negligence of a receiver in charge of its property.—*Wilson v. Colorado & Southern Co.*, 303.

Purchaser of Railroad Liable for Receiver's Negligence—Mortgage Foreclosure Sale of a Railroad, the purchaser taking "subject to the liabilities of a receiver incurred in operating" the mortgaged properties, is liable for the negligence of the receiver in permitting a car containing dynamite to be unnecessarily retained upon the tracks, in the vicinity of private dwellings; in failing to in any way advise the public of the explosives, even after a fire had broken out in such proximity thereto that an explosion might reasonably be anticipated; and in failing to remove the car, while, after the fire had broken out, such removal was practicable; and this, even though the liability of the receiver has never been judicially established.—*Wilson v. Colorado & Southern Co.*, 303.

SPECIAL PROCEEDINGS.

Amendment—Where in a special proceeding the statute makes no provision for amendments, those of a substantial character are not to be allowed.—*Sugar City v. Crowley County*, 432.

SPECIFIC PERFORMANCE.

Contract—Certainty—Only reasonable certainty is required, considering the subject matter and purpose of the contract, the situation and relation of the parties, and the attending circumstances.

Where the party chargeable under contract received the benefits thereof, the court does not regard with favor objections grounded upon the incompleteness or uncertainty of the contract.

Where the chief purpose of a contract is manifest, and can be enforced, relief will not be refused merely because there is an impossibility to carry out some collateral or subsidiary agreement, according to the precise terms.—*Oles v. Wilson*, 246.

STATE MEDICAL BOARD.

Powers of the Board—The statute authorizing the revocation of a physician's license for publishing an advertisement relative to any disease of the sexual organs (Rev. Stat. § 6068) is void for uncertainty, and in violation of the 14th amendment to the Federal Constitution and § 3 of our Bill of Rights.—*Chenoweth v. State Medical Board*, 74.

Control of its Funds—Section 4, c. 189 of the Laws of 1911 is not in conflict with Rev. Stat. § 6071. It is within the authority of the State Medical Board to determine, absolutely, what expenditure shall be made of the funds arising in the lawful discharge of its duties,

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STATE MEDICAL BOARD—Cont.
subject only to the statutory requirement that at the close of each biennial period the balance shall be transferred to the General Fund of the State. These funds do not arise from any appropriation of the legislature, but from fees and fines collected by the Medical Board; and the Medical Board may withdraw such sums as are necessary to meet its obligations, either present or ensuing within the biennial period. But its financial affairs must begin with and be closed at the end of each biennial period. It may not withdraw funds near the close of one biennial period, for the purpose of depositing them during a succeeding biennial period, to meet expenses during such succeeding period. This would defeat the clear purpose of the statute.—*Kenehan v. State Medical Examiners*, 504.

STATE TREASURER. See *AUDITOR AND TREASURER.*

STATUTES.

Construction—A statute is to be interpreted by a consideration of the whole and every part thereof. The occasion and necessity of the enactment, and the mischief to be remedied, are to be borne in mind; it is to be presumed that the legislature intended what is reasonable and just, and not what is absurd and oppressive. And it is to be remembered that what is apparently within the letter of the act, is not within the statute unless evidently intended.—*National Company v. Schafer*, 56.

The provisions of the code should receive a construction in harmony with the manifest intent of the legislature, and one which will promote the convenience of parties to causes, and the courts, in the disposition thereof.—*Kingsley v. Clark*, 352.

The title of an act is not to be referred to where the provisions of the act are expressed in clear and unambiguous terms.—*Sugar City v. Crowley County*, 432.

A statutory clause purporting to repeal prior statutes is to be interpreted by the same rules as other enactments. The intention of the legislature must prevail over a literal interpretation. The title of a statute may be referred to, to aid in its interpretation.

And the reason, or the absence of reason, for the interpretation sought to be placed upon the enactment.—*Hogg v. San Miguel County*, 463.

Construed—Considering that by title of c. 181 of the Laws of 1903, it appears to have been the purpose of the legislature to deal with the estates, and not with the persons, of the insane; that it shows no intent to disturb the law relating to the trial of the sanity of a citizen; that no provision is made for the trial of an issue, in such cases, elsewhere than in the County Court, which had for so many years exercised the jurisdiction; that the act itself refers to the jurisdiction as still continuing; (§ 50) that it expressly provides for an inquisition in the County Court, upon allegation of the lunacy of a non-resident

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STATUTES—Cont.

(§ 54), it was held that § 174 of the act was not intended to repeal the provisions of § 2204 of the General Statutes of 1883, as amended by c. 119 of the Laws of 1893.—*Hogg v. San Miguel County*, 463.

Title—Sufficiency—Where it is clear that no member of the legislature could have been misled by the words used as the title to an enactment, nor any citizen of ordinary prudence led astray, the act will be sustained.

The title of the act of February 11, 1881, "An act to regulate elections for the removal of county seats," *held* broad enough to include an election for the permanent location of the county seat, which had been provisionally appointed by the act organizing the county. *Sugar City v.. Crowley County*, 432.

Repeal by Implication—A statute repeals by implication all prior legislation inconsistent with its provisions, even though the later enactment contains no repealing clause.—*Sugar City v. Crowley County*, 432.

As Affecting Private Contract—The provision of Rev. Stat. § 7026 that in the sale of water "every inch shall be considered equal to an inch square under a five inch pressure," etc., is not controlling, in the construction of a contract for the enlargement of a ditch, and prescribing a volume of water to which the owners, and those bearing the expense of the enlargement, shall respectively be entitled, unless this was the intention of the parties.—*New Brantner Co. v. Kramer*, 218.

Evidence of Enactment—Burden of Proof—The court has invariably noticed the documents evidencing action of the general assembly, subscribed by the proper officials, and found in the office of the secretary of state. They are accepted as *prima facie* evidence of the law, and whoever asserts the contrary has the burden of proof.—*Harrison v. People*, 137.

STATUTES CONSTRUED, CITED OR REFERRED TO.

Revised Statutes		Sec. 242	*Lane v. Lane*, 166.
"	"	" 694	*Salisbury v. LaFitte*, 358.
"	"	" 1171–1176	*Sugar City v. Crowley County*, 432.
"	"	" 2056	*Denver, etc. Co. v. Frederic*, 90.
"	"	" 2057, 2058	*Id.*
"	"	" 2112	*Rogers v. Rogers*, 132.
"	"	" 2235	*Riley v. Trainer*, 155.
"	"	" 2236	*Bromley v. Hallock*, 148.
"	"	" 2259	*Riley v. Trainer*, 155.
"	"	" 2265	*Id.*
"	"	" 2266	*Id.*
"	"	" 2312	*Sugar City v. Crowley County*, 432.
"	"	" 2660, 2661	*McPherrin v. Fair*, 333.
"	"	" 2678	*Blanke Co. v. Sargent*, 299.
"	"	" 2926	*Henwood v. People*, 544.

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STATUTES CONSTRUED, CITED OR REFERRED TO—Cont.

"	"	"	3024, 3025	*Jahl v. Lewis*, 109.
"	"	"	3162	*Colorado Midland Co. v. Edwards*, 163.
"	"	"	3177	*Ironstone Co. v. Ashenfelter*, 31.
"	"	"	3226	*Id. New Brantner Co. v. Kramer*, 218.
"	"	"	3276–3306	*Id.*
"	"	"	3637	*Salisbury v. LaFitte*, 358.
"	"	"	4044	*Empire Co. v. Crawford*, 281.
"	"	"	4108	*Scavarda v. People*, 541.
"	"	"	4479	*Sayre v. Leonard*, 116.
"	"	"	4512	*Lane v. Lane*, 419.
"	"	"	4521	*First National Bank v. Lewis*, 124.
"	"	"	5036	*Gault v. Fort Collins*, 324.
"	"	"	5729	*Imperial Co. v. Morris*, 194.
"	"	"	6068	*Chenoweth v. State Medical Bd.*, 74.
"	"	"	6444, 6445	*Ostling v. People*, 22.
"	"	"	6447	*Id.*
"	"	"	6525	*Gault v. Fort Collins*, 324.
"	"	"	6592	*Denver v. Lathan*, 371.
"	"	"	6592–6597	*Phipps v. Denver*, 205.
"	"	"	6631–6633	*Ostling v. People*, 22.
"	"	"	6963	*Erbaugh v. People*, 48.
"	"	"	7026	*New Brantner Co. v. Kramer*, 218. *Oles v. Wilson*, 246.
"	"	"	7141–7146	*Oles v. Wilson*, 246.
"	"	"	7206	*Id.*
"	"	"	7209	*First National Bank v. Cone*, 529.
"	"	"	7212	*First National Bank v. Cone*, 529.
"	"	"	7253	*Lane v. Lane*, 419.
"	"	"	7254	*Oles v. Wilson*, 246.
"	"	"	7267 cl. 7	*Id. Lane v. Lane*, 419.
General Statutes 1883 Sec. 2204				*Hogg v. San Miguel County*, 463.
Laws 1881 p. 103				*Sugar City v. Crowley County*, 432.
" 1903 c. 181 § 174				*Hogg v. San Miguel County*, 463.
" 1907 c. 172				*Trowbridge v. El Paso County*, 106.
" 1909 c. 164				*Koike v. People*, 414.
" 1911 c. 107 §§ 5, 6				*Colorado Midland Co. v. Edwards*, 163.
" 1911 c. 159				*Henwood v. People*, 544.
" 1911 c. 189 § 4				*Kenehan v. State Medical Board*, 504.
" 1911 c. 229				*Lane v. Lane*, 419.
" 1913 p. 685				*Riley v. Trainor*, 155.
Code, Sec. 16				*Oles v. Wilson*, 246.
" " 43				*Kingsley v. Clark*, 352.
" " 63				*First National Bank v. Lewis*, 124.
" " 80				*Rogers v. Rogers*, 132.
" " 81				*Empire Co. v. Crawford*, 281.
" " 186				*Jahl v. Lewis*, 109.

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STATUTES CONSTRUED, CITED OR REFERRED TO—Cont.
Code Sec. 231 *Empire Co. v. Crawford*, 281.
" " 241 *Id.*
" " 397 *National Co. v. Schafer*, 56.
" " 422 *Id.*

STATUTE OF FRAUDS.

Resulting Trusts, are excepted from the statute of frauds. Rev. Stat. §§ 2660, 2661.—*McPherrin v. Fair*, 333.

STREET RAILWAY COMPANY.

Duty Towards Children Playing in the Street—It is the duty of a street railway company to take notice that, at any place, children may be occupying the street, in their play, and it is under duty to exercise a degree of care commensurate with the circumstances, and such as would be exercised by a reasonably prudent person, in like case. And in the populous portions of a city it must exercise greater circumspection and care.

Where one in charge of a street railway car sees, or by due care would have seen, a child of tender years upon or in near proximity to the track, it is his duty to sound a warning, and immediately get his car under such control as to enable him to avoid injury to the child. —*Denver Tramway Co. v. Brown*, 485.

SUMMONS.

Alias, may properly issue as to defendant named in the complaint, after the lapse of many terms subsequent to the institution of the cause, even though no formal order of continuance has been made in the meantime, and though judgment has been rendered as to other defendants, and affirmed on appeal.—*Kingsley v. Clark*, 352.

The cause is continued from term to term, by operation of law, until, in some manner, final judgment is rendered. (Rev. Code § 43).— *Id.*, 352.

SUPPORT.

Deed Upon Consideration of—Failure to perform the stipulation for support is sufficient ground to vacate the deed, without any showing of fraud or undue influence in procuring it.—*Martinez v. Martinez*, 292.

SUPREME COURT.

Jurisdiction—Error to Court of Appeals—Judgment in the district court for $5,000 affirmed by the court of appeals. Interest accrued thereon subsequent to the original recovery is but an incident of the

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SUPREME COURT—Cont.
judgment, and not part of it. Its accrual does not have the effect to confer jurisdiction upon this court to review the judgment of the court of appeals.—*Colorado Midland Company v. Edwards*, 163.

Declaring Attorney's Lien—The parties to a writ of error having stipulated to a discontinuance thereof the court is without jurisdiction to declare a lien upon the properties recovered in favor of the attorneys of the successful party, for securing the fees to which they may be entitled pursuant to contract with the client.—*Lane v. Lyon*, 166.

TAX TITLES.

Assessment—Description—A custom of the county assessor to describe property by an abbreviation, in the assessment roll, will, in considering the validity of a tax sale based upon such an assessment, be disregarded. Any such custom is vicious and without effect.—*Dussart v. Abdo Co.*, 423.

Tax Deed—In Statutory Form, Prima Facie Evidence—A tax deed which recites that the sale was made in substantial conformity with the requirements of the statute is *prima facie* evidence of everything of which the statute declares that it shall be evidence.—*Imperial Co. v. Morris*, 194.

Void Deed—A tax deed which by its recitations shows that the land was sold to the county on the first day of the sale is void upon its face.

So a deed not attested by the official seal of the county treasurer where this is required by statute.—*Dussart v. Abdo Co.*, 423.

Deed Construed—A tax deed recited that the treasurer did "on the 15th day of October * * * at the sale begun and publicly held on the 14th day of October * * * expose to public sale at, etc. * * * in substantial conformity with the requirements of the statute * * * the real property above described" and that "at the sale so held as aforesaid * * * no bids were offered, etc. * * * and the treasurer having become satisfied that no sale of said property could be had" the same was stricken off to the county. *Held* that in view of the recitation that the statute was substantially observed it was not to be inferred that the lands were not offered on the 14th of October; that the phrase "at the sale so held as aforesaid" was not to be taken as referring only to what occurred on the day on which the lands were sold; that the statute does not require that the deed should disclose the day on which the land was first offered, and no presumption is to be indulged in contravention of the express recitals of the instrument, and the provisions of the statute. *Held*, further that the deed did not indicate that the county was a competitive bidder.—*Imperial Co. v. Morris*, 194.

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TRUSTS AND TRUSTEES.

Resulting Trust—One who, upon a consideration promised, agrees by word of mouth to purchase land for another, advancing the purchase money as a loan to his principal, is bound by the engagement.

If he take title in his own name, or in the name of a third person for his own use, equity will compel a conveyance to the principal.

That at the time of entering into the engagement he is negotiating for the land upon his own account and behalf, is immaterial.

In such case a resulting trust is created by operation of law. Such trusts are excepted from the statute of frauds. Rev. Stat. §§ 2660, 2661.—*McPherrin v. Fair*, 333.

Evidence—The facts from which the law raises a resulting trust in lands may be proven by parol.—*Id.*, 333.

VENDOR AND VENDEE.

Default in Payments—Effect—Where an agreement for the sale of lands provides that upon the purchaser's default to make the stipulated payments, at the dates appointed, the default shall, at the vendor's option annul the contract, the vendor is under no obligation to convey, after such default.—*Leonard v. Hallett*, 274.

Covenant to Convey Clear of Encumbrance—Knowledge on the part of the purchaser of lands, of an easement for an irrigating ditch, to which they are subject does not relieve the vendor of his covenant to convey clear of encumbrance, in the absence of evidence that the parties intended that such encumbrance should be excluded from the covenant. The property bargained for being city lots, intended merely for building sites, mere knowledge of the existence of the easement does not manifest such intent on the part of the purchaser.

The effect of such knowledge, were the lands agricultural lands, not decided.—*Eriksen v. Whitescarver*, 409.

VENUE.

Change in Criminal Causes—See CRIMINAL LAW.

VERDICT.

Construction—Where, taken in connection with the record, the verdict clearly conveys the intention of the jury, it is sufficient.—*Mitchell v. Crowl*, 405.

WAIVER. See *PLEADINGS, FRAUD.*

WATER RIGHTS.

Nature of the Right—Alienation—Change of Use or Place—The right to the enjoyment of water for a beneficial purpose is not confined to the particular land where the water is first applied; it may be

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WATER RIGHTS—Cont.
alienated, independently of the land, and changed from place to place, with the single limitation that the change shall not injuriously affect the vested rights of others.—*Ironstone Co. v. Ashenfelter*, 31.

Use of Stream as a Conduit—Whoever has developed water from a source extraneous to the stream may discharge it into the stream, and, using the stream as a conduit withdraw it below.—*Ironstone Co. v. Ashenfelter*, 31.

Seepage Water—Appropriation—Under Rev. Stat. § 3177, seepage water which is being wasted is the subject of appropriation. The appropriation thereof is not included in or controlled by a prior adjudication decree in the same district.—*Ironstone Co. v. Ashenfelter*, 31.

Adjudication of Priorities—Effect of Decree—A decree under the statute (Rev. Stat. §§ 3276-3306) adjudicating the priorities to the use of water settles everything necessary to complete appropriation and binds all those participating in the proceeding.—*Ironstone Co. v. Ashenfelter*, 31.

Change of Place or Use—The change must receive judicial sanction by proceedings under the statute. (Rev. Stat. § 3226.)

The evidence examined and held that the transfer of a volume of water from the original point of diversion, to a point miles up the stream was beneficial rather than injurious to those protesting.—*Ironstone Co. v. Ashenfelter*, 31; *Moore v. Ironstone Co.*, 47.

Leave to change the point of diversion can be obtained only by pursuing the course prescribed by the statute (Rev. Stat. §§ 3226-3229). —*New Brantner Co. v. Kramer*, 218.

Unlawful Diversion and Storage—The diversion and storage by an irrigating company of water to the use of which another is entitled, or the retention of it, after it is wrongfully impounded by another, will be relieved against in equity.—*Kern Co. v. Weldon Valley Co.*, 302.

Measurement of Water—Inches—The cases as to the meaning of the word "inch," in the measurement of water, examined, and the indefiniteness of the term, disclosed.—*New Brantner Co. v. Kramer*, 218.

WILLS.

Contract to Make a Particular Will or Bequest, if upon consideration and without surprise, imposition or fraud, is a valid contract, and may be specifically enforced in equity. That the beneficiary in the contract is, by his or her parent submitted to the custody and nurture of the promissor, is a sufficient consideration. No valuation can be placed upon the society, companionship and filial obedience of a child towards its foster parent, or the sacrifice which the parent makes, in the surrender of his child; therefore the courts will not inquire as to the adequacy of the consideration where the promissor has received and enjoyed that to which, under the contract, he became entitled.—*Oles v. Wilson*, 246.

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WILLS—Cont.

Plaintiff's father entered into a written agreement with Macky, when plaintiff was only seven years of age, by which he committed plaintiff to the care and nurture of Macky and his wife. The agreement provided that the child should become a member of the family of Macky, subject to his discipline and that of his wife, until her majority, that she should receive a liberal education, and that Macky would by his will devise to the child a portion of his estate, equal in the minimum to one-third of the value of the whole thereof. At the time of this agreement the child's mother was dead, and the father and Macky were intimate friends. The child remained in the family of Macky, performing the duties of a child, until after her majority. The court declined to hold the contract voidable, for inadequacy of consideration, want of certainty, mutuality, or equity.—*Id.*, 246.

WORDS AND PHRASES.

"*Operate*," as applied to the movement of railway trains, includes all that is intended by the words "running, conducting or managing" any train of cars in Rev. Stat. § 2056.—*Denver, etc. Co. v. Frederic*, 90.

"*Without Defalcation*," in a promissory note have no meaning.—*First National Bank v. Lewis*, 124.

"*All Demands*," in a statute classifying the claims against a decedent's estate, and providing for their exhibition in the court having jurisdiction of the administration of such estate, does not include the right of one to whom, upon due consideration, the deceased has covenanted to devise a specified share of her estate.—*Oles v. Wilson*, 246.

Ex. C. M.
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